

People v Vasquez
2019 NY Slip Op 32494(U)
August 23, 2019
City Court of Peekskill, Westchester County
Docket Number: CR-5177-17
Judge: Reginald J. Johnson
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CR-5177-17

CITY COURT: CITY OF PEEKSKILL
COUNTY OF WESTCHESTER: STATE OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION &
ORDER

Dockets. CR-5177-17

RAIMER VASQUEZ,

Defendant.

-----X

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HON. REGINALD J. JOHNSON

A SCRAM (Secured Continuous Remote Access Monitor) hearing was held on May 31, 2019 to determine if the defendant had violated his conditional plea agreement. One of the dispositive issues in this case was whether the Court had to hold a hearing and find by a preponderance of the evidence or by a lesser informal standard that the defendant violated his conditional plea agreement based on an alcohol alert from his SCRAM bracelet.

Based on the following, the Court finds that where the defendant is alleged to have violated his conditional plea agreement prior to sentencing by triggering an alcohol alert from his SCRAM bracelet, the Court may conduct a summary hearing pursuant to Criminal Procedure Law §400.10 or some other fair means, so long as the defendant is afforded an reasonable opportunity to contest the violation, which may, in the Court's discretion, be done through live testimony, informal conference, affidavits, legal memoranda, or such other evidence that satisfies the Court that the defendant violated his conditional plea agreement.

Factual and Procedural History

On November 11, 2017 at approx. 4:01 a.m. on Carhart Ave east bound at Husted Ave, in the City of Peekskill, the defendant was operating a Black 2005 Acura Sedan when he was stopped for allegedly failing to stop at a stop sign at that location. After observing the defendant, P.O. Evans determined that his eyes were glassy, that his speech and motor coordination were impaired, and that an odor of alcohol emanated from the defendant. P.O. Evans administered SFSTs¹ to the defendant roadside and he failed the Horizontal Gaze Nystagmus, Walk and Turn and One Leg Stand tests.

¹ Standardized Field Sobriety Test

CR-5177-17

Defendant's chemical test registered a blood alcohol content reading of .16%, and he admitted that he consumed 1 to 5 beers prior to the stop. The defendant was arrested and charged with Driving While Intoxicated in violation of Vehicle & Traffic Law (VTL) §1192.2, Driving While Intoxicate in violation of VTL §1192.3, and Failing to Stop at a Stop Sign in violation of VTL §1172.

On November 13, 2017, the defendant was arraigned and on January 8, 2018, TASC and open file discovery were completed. On May 1 and 14, 2018, the People offered the defendant admission into the Enhanced DWI Program (EDP). On May 14, 2018, the defendant executed the EDP contract and the matter was rescheduled for June 18, 2018 and August 9, 2018, for proof that the defendant installed the SCRAM bracelet, enrolled in treatment through the probation department² and installed IID on any vehicle he owned or intended to operate, if applicable. The defendant also pled guilty to VTL §§1192.3 and 1192.1. The Court scheduled sentencing for November 8, 2018. However, on September 14, 2018, the Court received a notification of violation from the Department of Probation indicating that the defendant's SCRAM bracelet issued an alcohol detection alert on September 2 and 3, 2018. The Court ordered a Pre-Sentence Report for March 14, 2019.

² The probation department ordered the defendant to enter program for DWI and he was to provide proof of enrollment at sentencing on November 8, 2018.

CR-5177-17

After several adjournments, the Court scheduled a SCRAM hearing on the alleged alcohol violation for May 31, 2019.

SCRAM Hearing

The People presented Jennifer Marie Cento, an employee of Alcohol Monitoring Systems, Inc. [AMS], the monitoring agency for Rocky Mountain Offender Management Services for New York [Rocky Mountain Services]. Ms. Cento testified that her job responsibilities were to meet with the defendant; review the rules and contract with the defendant; install the SCRAM bracelet on defendant's ankle; maintain the SCRAM bracelet's performance; monitor the defendant's SCRAM bracelet readings and report any alerts to the appropriate agency—here the Department of Probation.

On July 17, 2018, Ms. Cento installed a SCRAM bracelet [#127930] on the defendant's right ankle that was fully functional for 365 days from the date of installation. Ms. Cento said that she entered data from the bracelet into the computer and the computer did not indicate that the bracelet had any operational issues. On cross examination, Ms. Cento said that although the rules state various items to avoid (e.g., hand sanitizer, foods and medications containing alcohol), copies of the rules are not provided to the defendant and there was no policy in place requiring her to do so. Ms. Cento said that she did not believe kissing someone who ingested alcohol would produce an

CR-5177-17

alcohol alert, although she could not be certain. Lastly, Ms. Cento said that she was not trained in reading graphs.

Next, the People presented Marcela Hoyas who is the Regional Manager for Rocky Mountain Services. Ms. Hoyas testified that some of her duties include program directing, conducting training sessions for courts, and reviewing reports of violations of alcohol from the monitoring program. Ms. Hoyas said that SCRAM is an acronym for Secured Continuous Remote Alcohol Monitoring; the bracelet monitors alcohol ingestion/exposure twenty-four hours a day, seven days a week. The bracelet extracts insensible perspiration—specifically, gases emitted from the skin, every 30 minutes into the bracelet for analysis. There is a strict criteria for detecting a violation: 1.) zero (.00%) baseline reading is established; 2.) the absorption rate must be .10% or less; 3.) peek out; 4.) elimination rate must be less than or equal to 0.35%; 5.) reading must return to zero (.00%) baseline; and 6.) contamination test must not fail. The bracelet analyzes environmental conditions around the body to detect environmental contaminants as a safeguard. If the bracelet is exposed to external alcohol [an environmental contaminant like hand sanitizer], then it would register a spike off the graph chart because it is highly sensitive to external alcohol and unable to absorb it. If the bracelet detected an external contaminant, then the contamination

CR-5177-17

test would fail, and the bracelet would cease further monitoring.

Ms. Hoyas said that she would receive daily alerts for bracelets that were malfunctioning, and that every 8 hours all fully functioning bracelets do a self-test for maintenance purposes. If a bracelet fails the self-test, then it will not perform any further readings until a new bracelet is installed. A calibration certificate for each bracelet is produced to ensure that the bracelet is functioning before installation.

Ms. Hoyas has received SCRAM CAM Level I training by AMS, which included training on the basic features of the SCRAM bracelet, installation of the bracelet and monitoring of users. In addition, Ms. Hoyas has also received Level 2 Advanced Systems Operations training by AMS, which included SCRAM detection alcohol techniques and methods, including 160 hours of training time on the use of the SCRAM bracelet. Ms. Hoyas has been employed 9 years in this field and has supervised over 8000 cases. According to Ms. Hoyas, 49 states use SCRAM devices and that no court in New York State has found the SCRAM device scientifically unreliable. Further, thirty-one scientist have peer reviewed the SCRAM device and found it scientifically reliable.

According to Ms. Hoyas, when a SCRAM device detects alcohol, it will generate an alert that will be sent to AMS and analyzed by a data

CR-5177-17

analyst; if the alert is confirmed, then it will be sent to a case manager for review; and, if confirmed by the case manager, a Client Non-Compliance Report will be generated and a copy of same will be sent to the appropriate agencies. Ms. Hoyas has reviewed reports in both instances where a report was generated based on a confirmed alert and false alert. Ms. Hoyas reviewed the defendant's Non-Compliance Report based on an alcohol detection event between September 2 and 3, 2018 [People's "1"]. She determined that the strict criteria for validating an alcohol detection was followed and that the alert was based on defendant's consumption of alcohol. Ms. Hoyas further determined that the SCRAM device was fully functional, calibrated and properly installed on the defendant [People's "2" and "3"].

On cross examination, Ms. Hoyas stated that since every person has a different metabolic rate, the strict criteria for determining an alcohol violation was implemented to comply with objective testing standards set forth in Daubert/Frye. Ms. Hoyas said that all seven (7) alcohol criteria must be satisfied before a violation is detected, and, in this case, the criteria was met. There is a pass/fail system on the bracelet which confirms an alcohol event. There needs to be two 0.00% readings before an event is closed. In other words, an alcohol event must be between two 0.00% readings. Ms.

CR-5177-17

Hoyas stated that AMS has been sued by parties who believed the readings were inaccurate, but that she did not know the specifics of those lawsuits. Ms. Hoyas stated that where there is a failed test, a confirmatory report is provided to the court, the probation department and the district attorney within 24 hours of alert, and not to the defendant or defendant's attorney. No list of items to avoid is provided to defendants because the list would need to contain items to numerous to list.

The defendant produced Regina Saez, his girlfriend, as a fact witness.³ Ms. Saez testified that she did not observe the defendant drink any alcohol on September 2 or 3, 2018. On cross examination, she said that she and the defendant attended a family picnic at Blue Mountain Park and that she did not observe the defendant drink any alcohol during the picnic.

The defendant testified that his SCRAM bracelet was installed on July 17, 2018 and that he had not ingested any alcohol from the date of installation through October 15, 2018. Further, defendant said that he does not keep alcohol in his house because of his children. On cross examination, the defendant said that he has two children in common with Ms. Saez.

Defendant said that he stayed at the park on Sunday, September 2, 2018, until the park got dark. However, he maintained that he did not consume any

³ The Court notes that the defendant did not produce an expert witness at the hearing to rebut the conclusions of the people's expert witness.

CR-5177-17

alcohol from September 2 up to and including the 90-day period from July 17, 2018 to October 15, 2018⁴. Defendant said that three (3) months is a short period of time to risk destroying his life and career over drinking alcohol. Lastly, defendant said that he attended a wedding during the period between July 17, 2018 to October 15, 2018 and the he did not consume alcohol at the wedding, and that if he had known that his SCRAM bracelet indicated that he had consumed alcohol he would have taken action quickly to disprove the alert by hiring an attorney or taking some other action.

During his closing argument, the defendant argued that he went through extraordinary lengths to avoid products that contained alcohol, and that he had been problem-free 89 of the 90 days, so why would he commit a violation with only one day remaining before the SCRAM bracelet was to be removed? Lastly, the defendant argued that the People's witnesses did not fully and adequately explain the parameters of the SCRAM bracelet's operation and methods of detecting violations.

The People argued that the holding of the Court of Appeals in *People v. Fiammegta*, (14 N.Y.3d 90, 99 [2010]), that a court is not required to hold an evidentiary hearing or employ a preponderance of the evidence standard to determine whether an accused violated a plea agreement, so long as the

⁴ The 90-day period is the length of time a defendant who enters the Enhanced DWI Program must remain free of violations.

CR-5177-17

court inquires into the merits of the violation, is applicable to this hearing. The People also argued that the testimony of the defendant's girlfriend should be view as testimony from a biased witness. The People argued that Ms. Centeno and Ms. Hoyas testified credibly that defendant's SCRAM bracelet was fully functional, properly installed, and confirmed that defendant had ingested alcohol after the strict criteria for an alcohol violation was met. The People also argued that the defendant admitted to police (see 710.30 notice) that he had 1 to 2 beers at the time of the underlying offense. Lastly, the People argued that the SCRAM device has been scientifically accepted and deemed reliable by the courts of New York State and throughout the country.

Discussion

In New York, the standard for accepting expert testimony regarding the admissibility of scientific evidence is the standard set forth in *Frye v. United States*, 293 F.1013, 1014 [D.C. Cir. 1923], which held that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field. Accordingly, "the *Frye* test asks 'whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally'" (*Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434,

CR-5177-17

446 [2006], quoting *People v. Wesley*, 83 N.Y.2d 417, 422 [1994]). After the general reliability concerns of *Frye* are satisfied, the court must consider whether there is a proper foundation “for the reception of the evidence at trial” (Id. at 429). A court need not hold a *Frye* hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony. “Once a scientific procedure has been proved reliable, a *Frye* inquiry need not be conducted each time such evidence is offered [and courts] may take judicial notice of reliability of the general procedure” (Id. at 436; *Matter of Lahey v. Kelly*, 71 N.Y.2d 135, 141 [1987]). Since other courts have determined that the SCRAM device and technology is generally accepted as reliable in the relevant scientific community, a *Frye* hearing is unnecessary in the instant matter (see, *People v. Dorcent*, 29 Misc.3d 1165 [N.Y. Crim. Ct. 2010]; *People v Hakes*, 32 N.Y.3d 624, 626-627 (2018) [the reliability of SCRAM device in New York was presumed as Court of Appeals stated, “[t]he principal question presented in this case is whether, as a condition of probation, sentencing courts can require a defendant to wear and pay for a Secure Continuous Remote Alcohol Monitoring (“SCRAM”) bracelet that measures their alcohol intake. We hold that they can.”]).

The admissibility of expert testimony in New York must be relevant

CR-5177-17

to the issue in the case, based on principles generally accepted in the specific scientific community, proffered by a qualified expert, and on a topic beyond the knowledge of the average juror (see, *People v. Legrand*, 8 N.Y.3d 449, 452 [2007]; *People v. Wesley*, *supra*). Further, the admissibility of expert testimony is within the sound discretion of the court (see, Prince, Richardson on Evidence, §7-301 [Farrell 11th ed]). In the case at bar, the Court finds that the testimony of Ms. Hoyas was relevant to the issues in this case—specifically, the effect of alcohol on the body and the principles underlying its detection by the SCRAM bracelet. Ms. Hoyas testified that 49 states utilize SCRAM bracelets, that no New York court has found SCRAM technology unreliable and that 31 scientists have peer reviewed SCRAM technology and have found it reliable. Further, Ms. Hoyas has been extensively trained on the use, operation and principles underlying the SCRAM bracelet, having received over 160 hours of training on the bracelet. Ms. Hoyas has also been employed in the SCRAM technology field for 9 years and she has supervised over 8000 SCRAM bracelet cases. The Court deems Ms. Hoyas an expert on SCRAM bracelets and technology. The Court finds that since SCRAM technology is beyond the knowledge of the average juror, Ms. Hoyas' testimony on the subject would aid the jury and/or Court in its understanding of the use and operation of the SCRAM bracelet;

CR-5177-17

therefore her testimony was properly received as an expert on the subject.

In New York, a defendant charged with an alleged violation of probation or conditional discharge must be afforded an evidentiary hearing where he is entitled to an attorney, where he may present evidence and cross examine witnesses, and where the court must base its finding of a violation upon a preponderance of the evidence standard (see, Criminal Procedure Law (CPL) §410.70; *People v. Crandall*, 51 A.D.2d 841 [3d Dept. 1976]; *People v. Davis*, 161 Misc.2d 533 [N.Y. Sup. Ct. 1994]; *People v. Neuroth*, 172 A.D.2d 886 [3d Dept. 1991]); *People v. Sorge*, 96 Misc.2d 922 [N.Y. Sup. Ct. 1978]). However, there is no statutory standard for determining a violation of a conditional plea agreement (see, *People v. Dorcent*, 29 Misc.3d 1165 at fn. 26 [N.Y. Crim Ct. 2010]). In *People v. Fiammegta*, 14 N.Y.3d 90 [2010], the defendant was discharged from a drug treatment program for allegedly committing thefts. The defendant disputed the thefts and argued that the lower court should have afforded him an evidentiary hearing at which the people should have been required to prove the alleged thefts by a preponderance of the evidence (*Id.* at 97). The Court of Appeals rejected the defendant’s argument and held that “when a program discharges a defendant for misconduct, the court must carry out an inquiry of sufficient depth to satisfy itself that there was a legitimate basis for the program’s

CR-5177-17

decision, and must explain, on the record, the nature of its inquiry, its conclusions, and basis for them” (Id. at 98).

The *Fiammgeta* Court went on to hold:

Supreme Court was not required to conduct an evidentiary hearing in this case, or to determine by a preponderance of the evidence that defendant was guilty of the thefts of which he was accused. But the judge should have considered defendant’s argument that he was kicked out of the program based on thin evidence of wrongdoing after inadequate investigation; and he should have allowed defendant to submit letters and testimony or affidavits from his mother and girlfriend about the money they claimed to have sent him.

(Id.).

In *People v. Outley*, 80 N.Y.2d 702 (1993), the defendants pled guilty to criminal charges and were promised by the court specific sentences on condition that they did not get arrested before sentencing. All of the defendants were arrested before sentencing, but argued that since they denied the basis for their arrests, they were entitled to an evidentiary hearing at which the court had to find that they committed the underlying crimes for which they had been arrested by a preponderance of the evidence (Id. at

CR-5177-17

712). The Court of Appeals rejected defendants' argument and held

When an issue is raised concerning the validity of the post plea charge or there is a denial of any involvement in the underlying crime, the court must conduct an inquiry at which the defendant has an opportunity to show that the arrest is without proper foundation. The nature and extent of the inquiry—whether through a summary hearing pursuant to CPL 400.10 or some other fair means—is within the court's discretion. The inquiry must be of sufficient depth, however, so the court can be satisfied—not of defendant's guilty of the new criminal charge but of the existence of a legitimate basis for the arrest on that charge.

Id. at 713 [citation omitted].

Accordingly, while the Court agrees with the people that the defendant was not entitled to an evidentiary hearing on the issue of whether he violated his conditional plea agreement by triggering an alcohol alert from his SCRAM bracelet, it is difficult to conceive how a defendant could receive anything less than an evidentiary hearing since the people have the burden of proving that a proper, uniform procedure was followed in every

CR-5177-17

case where a SCRAM bracelet alert is alleged. “Once *Frye* has been satisfied, the question is ‘whether the accepted techniques were employed by the experts in this case.’ The focus moves from the general reliability concerns of *Frye* to the specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence at trial. The trial court determines, as a preliminary matter of law, whether an adequate foundation for the admissibility of this particular evidence has been established” (see, *People v. Wesley*, 83 N.Y.2d at 429) (citation omitted). Hence, proof that a proper, uniform procedure was followed in a specific case may require the testimony of a representative from AMS. However, a sufficiently detailed affidavit from a person with knowledge may be enough to permit the receipt of evidence at a summary hearing or a conference regarding the procedures employed in specific case [see generally, CPL §400.10(3)]. If the Court deems the affidavit insufficient, then it may take testimony under oath (*Id.*). The key to any summary hearing, conference or other informal method employed by the Court to determine if the defendant violated his conditional plea agreement, is that the defendant be permitted to controvert the evidence against him and/or to present evidence in his defense so that the Court can be satisfied that its enhancement of the defendant’s sentence was based on

CR-5177-17

reliable evidence (see, *People v. Outley*, 80 N.Y.2d at 713).

Here, the Court finds that the SCRAM bracelet and technology are scientifically reliable as a matter of law; that the testimony of Ms. Hoyas was properly received as an expert on the subject of the SCRAM bracelet; that a proper, uniform procedure was utilized in this case ensuring a reliable result; that the defendant was not entitled to an evidentiary hearing requiring the Court to find by a preponderance of the evidence that he violated his conditional plea agreement [see, *People v. Outley*, supra]; and that the proffered evidence was sufficient for the Court to find, and does so find, that the defendant violated his conditional plea agreement by ingesting alcohol and triggering an alcohol alert on his SCRAM bracelet.

Based on the foregoing, it is

ORDERED, that the parties are directed to appear in Court on September 16, 2019 at 9:30 a.m. for further proceedings.

This constitutes the Decision and Order of the Court.

Enter,

Honorable Reginald J. Johnson
City Court Judge
Peekskill, New York

DATED: August 23, 2019