People v Malaspina
2019 NY Slip Op 33366(U)
November 14, 2019
City Court of Peekskill, Westchester County
Docket Number: CR-3603-19
Judge: Reginald J. Johnson
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CR-3603-19

CITY COURT: CITY OF PEEKSKILL
COUNTY OF WESTCHESTER: STATE OF NEW YORK
---X
PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION & ORDER
Docket CR-3603-19

VINCENT MALASPINA,

Defendant.
---X

Anthony A. Scarpino, Jr.
District Attorney
1940 Commerce Street
Suite 204
Yorktown Heights, New York 10598
By: Stephen Ronco, Asst. District Atty.

Levine & Montana
Attorneys for Defendant
1019 Park Street—P.O. Box 668
Peekskill, New York 10566
By: Matthew Montana, Esq.

Reginald J. Johnson, J.

I.

The defendant was charged with Aggravated Driving While Intoxicated [VTL[1] §1192.2AA], Driving While Intoxicated with BAC of .08% [VTL 1192.2], Driving While Intoxicated [VTL 1192.3], and Moving from lane unsafely [VTL 1128(a)]. On September 9, 2019, the defendant was arraigned; his license suspended and surrendered; TASC[2] was assigned; a temporary order of protection was issued against the defendant; and the case was adjourned to October 10, 2019. On October 10, open file discovery was completed, and the defendant requested a Huntley/Dunaway/Mapp hearing, which was scheduled for October 25, 2019. Defendant served

[1] VTL is the acronym for Vehicle and Traffic Law
[2] TASC is the acronym for Treatment Alternatives for Safer Communities, which is a program within the Westchester County Department of Community Health that evaluates individuals for alcohol, drug or mental health problems.

discovery demands and requested a jury trial, which was scheduled for November 18, 2019. On October 25, 2019, the Court conducted a combined Huntley/Dunaway/Mapp hearing. The People produced Peekskill P.O. Frank Muscente as its witness. The defendant did not testify. The Court makes the following Findings of Fact and Conclusions of Law.

II.

Findings of Fact

The Court finds the testimony of P.O. Frank Muscente to be credible. P.O. Muscente has been employed as a patrol officer by the Peekskill Police Department for two years; his duties include, among other duties, enforcement of the vehicle and traffic laws and penal laws, including special assignments. Previously, P.O. Muscente worked as a police officer for the Town of Newburgh for about 1 ½ years and prior to that as an officer for the Dutchess County Sheriff and the Town of Marlboro. P.O. Muscente has conducted 50 to 60 DWI investigations as a police officer.

On September 6, 2019, P.O. Muscente was assigned to the 4:00 p.m.-midnight tour in a marked patrol vehicle. At approximately 8:05 p.m., P.O. Muscente and P.O. Santos responded to the 400 block of Union Ave, Peekskill, on a report of a property damage automobile accident. Upon arriving at the accident scene, P.O. Muscente observed a 2018 blue four door Hyundai Elantra disabled in the middle of the roadway with heavy front-end damage. He also observed a female, later identified as the defendant's wife, in the driver's seat of that vehicle who appeared to be upset. The defendant was standing outside the vehicle on the driver's side speaking with his wife. P.O. Muscente spoke with the defendant and his wife regarding the accident and the defendant told him that his wife was driving when she hit a parked car. P.O. Muscente observed that defendant had slurred speech, glassy eyes, alcoholic breath, and he appeared heavily intoxicated. P.O. Muscente spoke with the defendant's wife, but defendant continued to inject himself into their discussion until he separated them and spoke to defendant's wife alone. Defendant's wife said that she was the operator of the vehicle at the time of the accident, but then after further questioning she said that she did not remember who was driving the vehicle.

P.O. Santos arrived at the scene of the accident and spoke to Ann Marie Hongach, witness and owner of the damaged parked vehicle; she said that she heard a loud bang, looked out her window and saw the defendant exit the driver's side and order the front seat passenger (defendant's

wife) to get into the driver's seat. Ms. Hongach was at the scene when the police arrived. Defendant was taken back to the Peekskill Police Department and interviewed when he admitted that he was driving at the time of accident, as recorded on P.O. Muscente's Body 1 camera. At the police department, the defendant was administered Standardized Field Sobriety Tests (SFSTs)—Horizontal Gaze Nystagmus test, Walk-and-Turn test, and the One Leg Stand test, and failed them all. He was also administered a portable breath test (PBT) which registered a breath alcohol reading of .19%. Thereafter, the defendant was placed under arrest and given DWI and Miranda Warnings (see Exhibits 6 and 7 in evid.). Defendant consented to a chemical test which yielded a .18% BAC.[3] The defendant was issued a desk appearance ticket and released.

On cross examination, P.O. Muscente confirmed that when he arrived on the scene, the defendant's wife was seated in the passenger seat, and the defendant was outside the vehicle standing at the driver's side door speaking with her. P.O. Muscente said that he was not an accident construction expert. P.O. Muscente did not recall if defendant's vehicle was running at the time he arrived at the scene of the accident, but the driver and passenger's airbags deployed.
P.O. Muscente said he did not know what seat belt stretch is. P.O. Muscente said that Ms. Hongach told him that defendant appeared intoxicated, that he had been yelling at his wife, and that she was crying. P.O. Muscente said that Ms. Hongach told him that the defendant was outside of vehicle trying to push it while his wife was in the driver's seat. P.O. Muscente said that Ms. Hongach told him that she believed defendant was operating the vehicle that struck her car. P.O. Muscente was cross examined regarding statements made on his body camera video. Specifically, he stated that the defendant's wife said that she was at Kyle's bar for a drink with her daughter when she received a call from the defendant that he wanted her to pick him up from the Buchanan Firehouse. P.O. Muscente said that the defendant's wife said that she thought she was driving but she was not 100% sure, but that she never said that the defendant was driving the car. Further, P.O. Muscente said that the body camera video taken by P.O. Santos recorded Ms. Hongach stating that she was not sure if the defendant was driving the vehicle and that she only heard the accident (she did not see the accident), but she said she saw the defendant and his wife switching seats after the accident. P.O. Muscente also said that the defendant said he was driving the vehicle but that he immediately corrected himself and said that his wife was driving the vehicle. Lastly, P.O. Muscente said that

[3] BAC is the acronym for blood alcohol content

he observed an injury on right arm of the defendant's wife; he observed no injury on the defendant's body.

In closing, the defendant argued that the People failed to prove that the police had probable cause to arrest him and failed prove that he was the operator of the vehicle that struck the parked vehicle. Defendant further argued that there were no witnesses who observed him operating the vehicle, that Ms. Hongach said that she did not know who was operating the vehicle, and that he has repeatedly denied operating the vehicle. Further, defendant argued that his wife repeatedly stated that she was driving the vehicle at the time of the accident. Defendant argued that P.O. Muscente's testimony was misleading because he never stated that the defendant immediately corrected and denied his previous statement that he was driving the vehicle at the time of the accident. Lastly, the defendant argued that he did not have any injuries after the accident, but that his wife did exhibit injuries that were consistent with her being the driver. The People argued that issues of operability and credibility are central to this hearing. The People further argued that Hongach had no motive to lie, but that the defendant and his wife did have a motive to lie. Defendant's wife's repeated admission that she drove the vehicle that struck the parked car and then her statement that she did not know who was driving the car at the time of the accident is incredible. Further, Ms. Hongach said that after the accident she saw defendant get out of the driver's side of the vehicle and switch seats with his wife. Lastly, the People argued that intoxication is not an issue in this case and that the statements given by the defendant to the police were knowingly, intelligently and voluntarily made.

III.

Conclusions of Law

The purpose of a pre-trial suppression hearing is not to determine whether the defendant committed the offense with which he is charged, but rather to determine whether certain evidence should be admitted or excluded at trial (see, *People v. Morgan,* 226 A.D.2d 398 [2d Dept 1996]. In a suppression hearing, the burden is on the People to first establish the legality of the police conduct (see, *People v. Whitehurst,* 25 N.Y.2d 389, 391 [1969]; *People v. Wise,* 46 N.Y.2d 321, 329 [1978]). The People must present to the court not only credible evidence (see, *People v. Berrios,* 28 N.Y.2d 361 [1971]), but also facts not merely conclusions or beliefs of the witnesses (*People v. Dodt,* 61 N.Y.2d 408 [1984]). Once the People meet its initial burden, the defendant bears the ultimate burden of showing the illegality of the police conduct (*Berrios,* 28 N.Y.2d at

367).

In New York, street encounters between the police and private citizens are governed by *People v. DeBour (*40 N.Y.2d 210 [1976]; see also, *People v. Hollman,* 79 N.Y.2d 181 [1992]). Under *De Bour,* the Court of Appeals set forth four levels of police intrusions and the quantum of proof necessary to justify them. Under level 1, the police may approach a private citizen and request information when they have an objective credible reason for the approach, not necessarily indicative of criminality. Under level 2, if the police have a founded suspicion that criminal activity is afoot, they may approach a private citizen and engage in a common law right of inquiry which means that their questioning may be more extensive and accusatory inquiry in nature. Under level 3, where the police have a reasonable suspicion that a person has committed, is committing, or is about to commit a crime, they may forcibly stop, frisk and detain the person. Under level 4, if the police have probable cause to believe that a person committed a crime, they may arrest that person.

A police officer can effectuate a warrantless arrest when he has probable cause or reasonable cause—in New York the terms are used interchangeably (see, *People v. Maldonado,* 86 N.Y.2d 631, 635 [1995]; see also, *People v. Johnson,* 66 N.Y.2d 398, 402 n. 2 [1985]), to believe that the suspect has committed a crime, whether or not the crime occurred in the police officer's presence (see, CPL[4] §§140.05, 140.10(1)[b]). In addition, VTL §1194(2) authorizes a police officer to request that a driver who has been involved in an accident to submit to a breath test, and if positive, to submit to a chemical test. In fact, VTL §1194(2)(a)(1) states that any driver who operates a motor vehicle in New York shall be deemed to have given his consent to a chemical test if the police officer has reasonable cause to believe that the person operated a motor vehicle in violation of VTL §1192 and said test was administered within 2 hours after the driver's arrest. Further, where the totality of the available facts at the time of arrest make it "more probable than not that the defendant [was] actually impaired, (see, *People v. Vandover,* 20 N.Y.3d 235, 239 [2012]), an arrest for driving while intoxicated is lawful.

In the case at bar, there is no dispute that the defendant was intoxicated, as his chemical test BAC reading was .18%.[5] The pre-eminent issue in this case is whether the People presented sufficient evidence that the defendant operated the motor vehicle at the time of the accident. The

[4] CPL is the acronym for Criminal Procedure Law
[5] Defendant's chemical test BAC reading of .18% constituted Aggravated Driving While Intoxicated (see, VTL §1192.2-a(a).

Court finds the testimony of P.O. Muscente to be credible [see, *People v. Glenn,* 53 A.D.3d 622 [2d Dept 2008] (credibility determinations made by suppression court are entitled to great weight), *People v. Bhattacharjee,* 51 A.D.3d 684 [2d Dept 2008] (same), *People v. Wynter,* 48 A.D.3d 492 [2d Dept 2008] (same)]. The undisputed testimony is that P.O. Muscente has been involved in 50 to 60 DWI investigations in his career. Further, he responded to the scene of a property damage auto accident and conducted, in this Court's view, an unbiased and professional investigation of the facts and circumstances that led to the car accident. P.O. Muscente exhibited no motivation to lie or to mislead the Court. He simply reported what the parties and a witness reported to him during his investigation, all of which were recorded on his body camera and the body camera of P.O. Santos. Ms. Hongach, a witness and owner of the damaged parked vehicle, said that she heard a loud bang, looked out of her window and saw the defendant exit the driver's side of the car that struck her car, and he ordered a woman, who was in the front passenger seat, to switch seats with him. According to P.O. Muscente, the defendant, who was highly intoxicated, told him that his wife was driving the vehicle at the time of the accident, then he stated that he was driving at the time of the accident, but then he immediately denied that he was driving and said his wife was driving. Defendant's wife repeatedly told P.O. Muscente that she was driving at the time of the accident, but then after further questioning by him, she stated that she did not remember who was driving at the time of the accident. Defendant's wife's initial and repeated claim that she was the driver of the vehicle at the time accident and then her subsequent claim that she did not know who was driving the vehicle at the time of the accident is incredible and unworthy of belief.[6]

Since there was no direct evidence of the defendant's operation of the vehicle at the time of the accident, can his alleged operation of the vehicle be proven by circumstantial evidence? Yes. The element of operation can be proven by circumstantial evidence—that is, there need not be direct, eyewitness testimony that the defendant operated the vehicle (see, *People v. Booden,* 69 N.Y.2d 185 [1987]; *People v. Blake,* 5 N.Y.2d 118 [1958]; *People v. Dunster,* 146 A.D.3d 1029 [3d Dept 2017], leave to appeal denied, 29 N.Y.3d 997 [2017]; *People v. Szyzskowski,* 89 A.D.3d 1501 [4th Dept 2011]). In *People v. Barrett,* 22 Misc.3d 1134(A) [Essex County Ct. 2009], the Court stated:

[6] Defendant's wife told P.O. Muscente that she had met her daughter at Kyle's for drinks prior to the accident. If that is true, then it is not clear to the Court why a PBT or SFSTs were not administered to the wife, particularly in light of the fact that she claimed not to know who was driving the vehicle at the time of the accident.

> It is without question that observation of a defendant actually driving a motor vehicle is not necessary to prove the crime of [DWI], and operation of a motor vehicle in such cases can indeed be established by circumstantial evidence, when coupled with an admission by the defendant or some other indicia of defendant's operation, such as identification testimony by an eye witness prior to the accident or the defendant's position in the driver's seat of a vehicle at the accident scene.

[citations omitted]

In the case at bar, the defendant's presence in and next to the vehicle, couple with Ms. Hongach's statement that she saw the defendant exit the driver's side and order his wife to switch seats with him after the accident is sufficient to infer that he was driving the vehicle at the time of the accident (see, *People v. Martinez-Guzman,* 36 Misc.3d 598 [N.Y City Crim. Ct. 2012]).

Based on the totality of the evidence—the report of a property damage car accident; defendant's intoxication at the scene and his repeated denial that he was not the driver, then his statement that he was the driver and then his immediate reversal that he was not the driver; defendant's on scene PBT reading of .18% and subsequent chemical test reading of .18%; defendant's wife's repeated claim that she was the driver and then her subsequent claim that she did not know who was driving the car at the time of the accident; Ms. Hongach's statement that she heard a loud bang, looked out of her window and saw the defendant exit his and order his wife switch seats with him, the Court finds that P.O. Muscente had reasonable cause to arrest the defendant for driving while intoxicated. Reasonable cause "exists if the facts and circumstances known to the arresting officer warrant a prudent [person] in believing that the offense has been committed" (see, *People v. Baker,* 20 N.Y.3d 354, 359 [2013] (citing *People v. Oden,* 36 N.Y.2d 382, 384 [1975]).

Since P.O. Muscente had reasonable cause to arrest the defendant, the Court finds that any physical evidence obtained from the defendant's arrest was lawfully obtained—e.g., body camera video, chemical test results, photos, 911 and radio transmissions, police booking video, etc., and will not be suppressed (see, *Mapp v. Ohio*, 367 U.S. 643 [1961]; *People v. Noonan*, 2018 NYLJ LEXIS 3266, *11 [City Court, Peekskill 2018]). It is well-settled that at a Huntley hearing, the People must prove beyond a reasonable doubt the voluntariness of the statements at issue (see, *People v. Holland*, 48 NY2d 861 [1979]; *People v. Wilhelm*, 34 AD3d 40 [3d Dept 2006]; *People*

v. Whittle, 96 AD2d 542 [2d Dept 1983]). The Court must examine the totality of the evidence presented and the circumstances surrounding the subject statements to determine whether or not the People have met their burden of proof (see, *People v. Anderson*, 42 NY2d 35 [1977]; People v. Westervelt, 47 AD3d 969, 971, [3 Dept 2008] ["The issue of the voluntariness of a statement is a factual question determined by the totality of the circumstances"]). In the case at bar, any statements made by the defendant prior to his arrest were not the product of a custodial interrogation, but the product of a noncustodial investigatory inquiry which does not implicate *Miranda v. Arizona*, 384 U.S. 436 (1966) [see, *People v. Mason*, 157 A.D.2d 859 (2d Dept. 1990); *People v. Brown*, 104 A.D.2d 696 (3d Dept. 1984) (Court held that Miranda warnings are not necessary in a DWI traffic stop)]. The Court also finds that any statements made by the defendant after he received his Miranda warnings occurred after he knowingly and intelligently waived his Miranda rights beyond a reasonable doubt. (see, *People v. Huntley*, 15 N.Y.2d 72 (1965); *People v. Rosa*, 65 N.Y.2d 380 (1985); see also, CPL §710.20).

Any other arguments raised by the parties and not specifically addressed in this Decision and Order have been considered and either rejected or deemed moot in light of the Court's ruling.

Based on the foregoing, it is

ORDERED, that the Defendant's motion to suppress physical evidence in this case, including his statements, and dismiss the charges is denied;

ORDERED, that the parties are directed to appear in Court on November 18, 2019 at 9:30 a.m. for jury selection.

This constitutes the decision and order of the Court.

Enter,

____

Hon. Reginald J. Johnson
Peekskill City Court

Dated: Peekskill, New York
November 14, 2019