

People v Pantore

2022 NY Slip Op 34746(U)

June 28, 2022

Supreme Court, Westchester County

Docket Number: Indictment No. 21-0436

Judge: Anne E. Minihan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

DENNIS PANTORE,

Defendant.

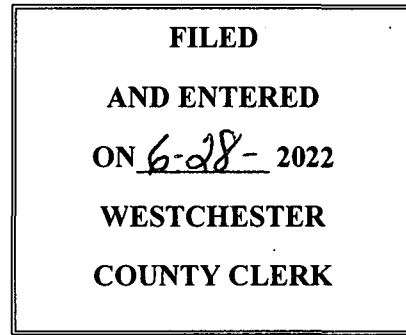
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Minihan, J.,

An indictment has been filed against the defendant charging him with aggravated driving while intoxicated per se (Vehicle and Traffic Law § 1192[2-a] [as a class E felony]), driving while intoxicated (Vehicle and Traffic Law § 1192[3] [as a class E felony]), and operating an unregistered motor vehicle (Vehicle and Traffic Law § 401[1][a]). The allegations are that, on or about February 11, 2021, at approximately 7:30 p.m. in the vicinity of Albany Post Road by the exit ramp from State Route 9 in the Town of Cortland, the defendant operated an unregistered motor vehicle while intoxicated by alcohol and while having .18 of one per centum or more of alcohol in his blood.

The People filed timely notices of their intent to introduce two oral statements which they attribute to the defendant. The first of which the People allege was made to police at approximately 7:30 p.m. while on the roadside, in which he, in substance and in response to a question posed by police, denied having consumed any alcoholic beverages and stated that he was driving from ShopRite in Croton to his home at Skytop. In the second noticed statement attributed to the defendant, the People allege that at approximately 8:40 p.m., the defendant responded to a question as to whether he had consumed any alcoholic beverages by stating that he had had one Budweiser. An identification notice was also timely filed. On February 24, 2022, the People filed an untimely statement notice regarding a statement which they allege was made by the defendant at the scene at approximately 7:37 p.m. in which he stated in substance that he was not able to drink because he had a feeding tube.

Defendant's omnibus motion sought, inter alia, suppression of the noticed statements attributed to defendant and suppression of the results of the defendant's chemical test. By Decision and Order dated October 6, 2021, this court granted the omnibus motion to the extent of ordering pre-trial *Huntley*, *Wade*, *Mapp/Dunaway* and *Sandoval* hearings. On May 12, 2022, combined *Huntley* and *Mapp¹/Dunaway* hearings were held before this court. The *Sandoval* hearing was deferred until immediately prior to trial and the People withdrew identification notice, obviating the need for a *Wade* hearing. With respect to the late-noticed statement, the People, conceding untimeliness, sought a ruling with respect to voluntariness.

¹ At the hearing, no testimony was elicited about the chemical test given to defendant at the New York State Police barracks. During a virtual conference held by the Court on June 28, 2022, both parties agreed that they are not looking for a ruling on the admissibility of the chemical test at this juncture. Prior to any evidence of this sort at trial, either party can ask the trial court for a ruling regarding the admissibility of the chemical test.



DECISION & ORDER
Indictment No. 21-0436

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TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Pursuant to the combined *Huntley* and *Dunaway* hearings, I give full credence to the testimony of the People's witness, Trooper Christopher Fitton of the New York State Police, whose testimony I found to be candid, plausible, and fully credible. The People's exhibits in evidence, without objection, consist of the Trooper's National Highway Traffic Safety Administration (NHTSA) Standardized Field Sobriety Test qualification card, his Advanced Roadside Impaired Driving Enforcement (ARIDE) certificate, photographs of the vehicles involved in the motor vehicle accident which precipitated police involvement leading to the defendant's arrest, and the Trooper's *Miranda* warning card. The defense called no witnesses and presented no evidence.

I make the following findings of fact and conclusions of law.

FINDINGS of FACT

On February 11, 2021, Trooper Christopher Fitton, a 6-year veteran of the New York State Police, was working from 7:00 p.m. to 7:00 a.m. assigned to routine patrol. At approximately 7:30 p.m., he was dispatched to a two-car property damage accident at Albany Post Road on the off ramp from State Route 9 in the Town of Cortlandt. Upon arriving, Trooper Fitton saw two cars on the left side of the exit lane – a Subaru with rear end damage in front of a Hyundai with front end damage (People's Exhibits 62c, 63a-63e).

The officer initially spoke with Victoria Kelly who identified herself as the driver of the Subaru before speaking with the sole occupant of the Hyundai whom he identified at the hearing as the defendant. The engine of the Hyundai was on, the keys were in the ignition, and the defendant was in the driver's seat. Initially, the trooper approached the defendant as part of his accident investigation and to check on the defendant's welfare to determine if he was injured or in need of medical attention. In speaking with the defendant, who provided a valid New York State driver's license with photograph, Trooper Fitton observed that the defendant had bloodshot, glassy eyes and droopy eyelids. Through the open driver's side window, as he stood outside the Hyundai, he also detected the odor of alcohol in the passenger compartment of the Hyundai before the defendant said a word. The defendant, who declined medical attention, responded to the question about where he had been coming from by stating that he'd come from ShopRite in Croton and was going home to Skytop, which the trooper testified was approximately a mile from the accident scene. When the defendant spoke, the trooper detected the odor of an alcoholic beverage on his breath. Believing the defendant's speech to be slurred, the trooper asked the defendant if he had consumed any alcohol which the defendant denied, explaining that he had a feeding tube and cannot consume alcohol.

Having observed the defendant's eyes and speech and after detecting the odor of alcohol in the vehicle and on the defendant's breath, the trooper instructed the defendant to get out of the car so that he could conduct standardized field sobriety tests. In complying, the defendant used the driver's door to assist in pulling himself out of the vehicle and he used the car to assist him in walking. The trooper observed that the zipper of the defendant's pants was open. Once at the back of his car, the defendant performed one standardized field sobriety test – the horizontal gaze nystagmus test. It was the trooper's impression that the defendant was initially argumentative –

that he answered back, yelled, and did not do what he was told to do although he ultimately complied.

As of the night of this incident, Trooper Fitton had made approximately one hundred or so arrests for alcohol related driving offenses. Some 6 years previously, while at the New York State Police Academy during his 6-month residential training program, Trooper Fitton received training regarding intoxicated motorists. He recalled taking part in a 40-hour class which included not only an instructional and a practical component but also a wet lab where they administered standardized field sobriety tests on intoxicated subjects. He was trained in identifying intoxicated motorists and in performing standardized field sobriety tests, among them, the horizontal gaze nystagmus, the walk and turn test, and the one leg stand test. In October 2016, upon his successful completion of the program, he received a National Highway Traffic Safety Administration (NHTSA) Standardized Field Sobriety Test qualification card (People's Exhibit 3). Trooper Fitton testified at the hearing that he was also certified in Advanced Roadside Impaired Driving Enforcement (ARIDE) (People's Exhibit 5), which involved additional training in other intoxicants as well as additional instruction regarding the administration of standardized field sobriety tests.

In administering the horizontal gaze nystagmus test, Trooper Fitton had the defendant stand between his car and the patrol vehicle with his back to the police car. Before commencing the test, the trooper made a medical assessment using a pen which he held up to the defendant's eyes to determine whether the defendant's pupil size was equal and that his eyes tracked equally. He instructed the defendant to put his feet together and put his arms by his side. The trooper then held his pen up to the defendant's eyes and told him to follow it with only his eyes while he completed the medical assessment aspect of the test. Had his eyes not tracked equally, the trooper would not have continued the test as the unequal tracking would indicate that any nystagmus observed related to a brain or eye issue. Once he medically cleared the defendant for this purpose, he administered the substantive part of the test looking for a possible total of six clues, lack of smooth pursuit (in each eye), distinctive and sustained nystagmus at a maximum deviation (in each eye), and nystagmus at 45 degrees (in each eye). At the hearing, the trooper testified how in these passes he looked for a jerking motion in each eye as a clue which would indicate horizontal nystagmus was present. The defendant exhibited all six clues and, when tested for a vertical gaze nystagmus, the trooper observed that as well. Although the defendant also submitted to a preliminary breath test which was positive for alcohol at 0.21%, the trooper was not able to administer either of the two other field sobriety tests other than the horizontal gaze nystagmus as he concluded that the walk and turn and one leg stand tests were not possible to administer because of the downslope of the roadway and the lighting in the area of the accident. On cross examination, the trooper conceded that it was possible that the downward slope of the roadway could have contributed to the manner in which the defendant was walking.

In addition to the approximately 100 prior arrests that Trooper Finton had made in his 6 years in the New York State Police, and the formal training he received, he had observed people consume alcoholic beverages and become intoxicated and he had observed people consume

alcoholic beverages and remain sober. Utilizing the training and experience he had formed up to that point, the observations he had made of the defendant's physical condition and speech, the odor of alcohol he detected on the defendant's breath, and the results of the horizontal gaze nystagmus test, Trooper Fitton formed the opinion that the defendant was intoxicated by alcohol. He arrested the defendant for driving while intoxicated at 7:50 p.m.

At approximately 8:32 p.m., Trooper Fitton read the defendant his *Miranda* warnings utilizing his *Miranda* card (People's Exhibit 7). He testified at the hearing that he told the defendant that he had the right to remain silent, that anything he said could and would be used against him in court, that he had the right to talk to a lawyer and to have a lawyer present with him while he was being questioned, that if he could not afford to hire a lawyer, one would be appointed to represent him free of charge before any questioning if he wished, and that he could decide at any time to exercise these rights and not answer any questions or make any statements (People's Exhibit 7). When he asked the defendant if he understood each of the rights that he had explained to him, the defendant responded that he did understand the warnings. Thereafter, the trooper asked the defendant if he had had anything to drink and the defendant responded that he had consumed one Budweiser.

CONCLUSIONS of LAW

At a *Dunaway/Huntley* hearing where the defendant challenges the legality of a seizure, together with statements which were allegedly obtained as a result, the People bear the initial burden of establishing the legality of the police conduct (*see People v Malinsky*, 15 NY2d 86 [1965]). Once the People have met their initial burden, the defendant must demonstrate the illegality of the police conduct by a fair preponderance of the credible evidence (*People v Berrios*, 28 NY2d 361 [1971]). As to statements, the People are charged with proving their voluntariness beyond a reasonable doubt (*People v Anderson*, 69 NY2d 651 [1986]; *People v Huntley*, 15 NY2d 72 [1965]).

Probable cause, or reasonable cause to arrest, while initially derived from case law has been defined by statute. CPL 70.10(2) provides that reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which collectively are of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment, and experience that it is reasonably likely that such an offense was committed and that the suspected person has committed it (CPL 70.10[2]). The Court of Appeals explains that the basis for a belief that there is probable cause for an arrest "must not only be reasonable, but it must appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator, for conduct equally compatible with guilt or innocence will not suffice" (*see People v Carrasquillo*, 54 NY2d 248, 254 [1981]). The determination as to whether a police officer had probable cause for an arrest should not be narrowly focused on any single factor, but rather on an evaluation of the totality of the circumstances, which takes into account "the realities of everyday life unfolding before a trained officer who has to confront, on a daily basis, similar incidents" (*see People v Wright*, 8 AD3d

304, 306-307 [2d Dept 2004]; quoting *People v Bothwell*, 261 AD2d 232, 234 [1st Dept 1999], *lv denied* 93 NY2d 1026, quoting *People v Grahan*, 211 AD2d 55, 58 [1st Dept 1995]). The police officer, in making the decision to arrest, need not eliminate all possible innocent explanations for the incriminating factual predicate he encounters (*see People v Mercado*, 68 NY2d 874, 877 [1986]) and, in fact, may act with probable cause even if mistaken if he has acted reasonably under the circumstances and in good faith (*see People v Colon*, 60 NY2d 78, 82 [1983]). An innocent explanation for behavior, such as the defendant's statement here that he cannot drink because he has a feeding tube, does not prevent the police officer from acting on his well-founded suspicions (*People v Thompson* (43 Misc3d 137[A] [Sup Ct App Term, 2d Dept 2014], *see also People v Daye*, 194 AD2d 339 [1st Dept 1993]).

As applied to drinking and driving offenses, the relevant inquiry is "whether, viewing the facts and circumstances as they appeared at the time of arrest, a reasonable person in the position of the officer could have concluded that the motorist had operated the vehicle while under the influence of intoxicating liquor" (*see People v Farrell*, 89 AD2d 987 [2d Dept 1982]). Trooper Fitton, who lawfully engaged the defendant in conjunction with his response to, and investigation of, a vehicular accident, had probable cause to arrest the defendant for driving while intoxicated based upon the totality of the circumstances which included not only the damage to the vehicles which suggested that the defendant's vehicle had rear-ended the vehicle in front of it, the defendant's glassy eyes, slurred speech, the odor of alcohol in the interior compartment of the defendant's vehicle, the odor of alcohol emanating from the defendant himself, the manner in which the defendant got out of his vehicle, the defendant's use of his vehicle to steady his gait, the results of the horizontal and vertical gaze nystagmus tests, and the positive results of the PBT (which was 0.21%) (*see People v Bigelow*, 66 NY2d 417, 423 [1985]; *People v Kowalski*, 291 AD2d 669, 670 [3rd Dept 2002]). Although he initially denied having consumed alcohol, defendant conceded he was the operator of the vehicle and moreover, he was in the driver's seat of the vehicle when the Trooper initially engaged the defendant.

The court declines to suppress the noticed statements allegedly made by defendant at the roadside, finding that they did not require *Miranda* warnings. Although *Miranda* warnings had yet to be given, the statements attributed to the defendant were made in response to legitimate preliminary and pre-custodial inquiries which were investigatory in nature. A defendant who has been temporarily detained pursuant to an accident investigation, including suspected violation of the Vehicle and Traffic Law's Driving While Intoxicated offenses, is not in custody for the purposes of *Miranda* (*see People v Parris*, 26 AD3d 393 [2d Dept 2006]; *People v Myers*, 1 AD3d 383 [2d Dept 2003]). A reasonable initial interrogation occurring in this context is merely investigatory and does not require administration of *Miranda* warnings (*see People v Mathis*, 136 AD2d 746 [2d Dept 1988]). Neither are *Miranda* warnings required before the administration of field sobriety tests (*see People v Hager*, 69 NY2d 141 [1987]). Here, since Trooper Fitton's temporary roadside detention of the defendant, who had just been involved in a minor vehicular accident was permissible, reasonable, and non-custodial, *Miranda* warnings were not required. With respect to the statement made post-arrest, at the New York State Police barracks, the court

finds it was voluntarily made after Trooper Fitton appropriately advised the defendant of his *Miranda* rights. The court also finds that the untimely noticed statement, in which defendant stated, in substance, that he was not able to drink because he had a feeding tube was made by him voluntarily. Thus, the noticed statements attributed to defendant are admissible; defendant's motion to suppress them is denied.

This constitutes the opinion, decision, and order of this Court. The parties are directed to appear before this Court in courtroom 203 on Tuesday, July 5, 2022 at 9:30 a.m.

Dated: White Plains, New York
June 28, 2022



HON. ANNE E. MINIHAN, A.J.S.C.

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