

DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT CRIMINAL PART 3

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff(s)

DOCKET NO. NA 11830/08

Present:

against

Hon. SUSAN T. KLUEWER

LORRAINE A. CELENTANO,

Defendant(s)
-----X

Decision After Hearing

Defendant's motion for an order suppressing certain evidence, including statements and the results of a chemical test of her breath, as, among other things, the product of an unlawful stop of her car, is granted.

Defendant is accused by five simplified traffic informations filed under this docket of driving while her ability to drive was impaired by the consumption of alcohol, driving above the posted speed limit, "passing steady red traffic signal light (without stopping)," failing to stop at a stop sign, and driving a car with an expired inspection sticker, although the last offense is described in the simplified traffic information as "expired registration" (see Vehicle and Traffic Law §§ 1192[1], 1180[d], 1111[d], 1172[a], 306[b]). The issue of whether any evidence should be suppressed as the product of an unlawful stop of her car, whether statements the People attribute to her should be suppressed on account of coercion, improper promises, or a violation of the requirements of *Miranda v. Arizona* (384 US 436[1966]), and whether the results of a chemical test of Defendant's breath should be suppressed as the product of an unlawful arrest came on before me for a stipulated-to hearing on October 16, 2009. At the conclusion of the hearing, counsel requested an opportunity to address certain issues by memorandum, and the matter was thus finally submitted to me on January 25, 2010. Two witnesses — Nassau County Police Officers Gary Renick and Kyle Poppe — testified at the hearing. They did so on the People's behalf.

Officer Renick testified that he was on duty on May 8, 2008 at 12:20 a.m., in plain clothes in an unmarked police car with his partner; that he was "in the

vicinity” of Old Central Avenue and Mill Road in Valley Stream, New York, a residential area; that there are two lanes in each direction on Mill Road; that there was not “any traffic” at the time; that he observed a white Nissan Altima; that it was dark out; that the road was lit by street lamps; that he was facing east; that the Nissan was facing west “so I was facing the Nissan;” that the Nissan made a right turn “from Roosevelt onto North Mill Road against a red light where it is posted no turn on red;” that the car stopped on “Flower Road;” that he approached the driver’s side of the Nissan; that his partner also approached the Nissan; and that the Nissan had no passengers. When asked if the driver was in the courtroom “today,” Officer Renick answered “yes,” and testified that the driver “was the woman sitting at the table with the brown suit.” The People then asked that the record reflect that Officer Renick identified Defendant, and I acknowledged that it could. Officer Renick next testified that, upon approaching the Nissan, he asked Defendant to produce her license and registration; that he was standing at the driver’s side window “a couple of feet away from her” at the time; that Defendant was still in the car; that he observed that Defendant’s eyes were bloodshot and glassy; that Defendant “said she was sorry and just wanted to get home;” that she said she “just lives up the block;” that he did not threaten her to make her speak; that he did not force her to speak; that he made no promises to induce her to speak; that Defendant was not aggressive, loud or disruptive in any manner; that Defendant was not under arrest at this point; that his partner was on the passenger side of the Nissan at the time; and that after Defendant made these statements, he asked her to perform standard field sobriety tests. He next testified that he thus asked her to recite the alphabet; that when she did so, her speech was slurred; that he conducted the horizontal gaze nystagmus test; that the test was “positive;” that he then administered the one-leg-stand and nine-step-walk-and-turn tests; that each indicated that Defendant was intoxicated; that Defendant was placed under arrest at 12:50 a.m.; that before she was placed under arrest, he (Officer Renick) called for assistance; that he thus spoke with Officer Poppe; and that he concluded at the time of her arrest that Defendant was intoxicated because she was unsteady on her feet, her speech was slurred, and “I witnessed the statements she made.”

On cross-examination, among the things that Officer Renick testified to was that when he first observed Defendant, he was stationary, and that he was at a red light. When asked if he was at the same intersection as Defendant, he answered “not exactly. It is an off-set intersection. In other words, your client was on Roosevelt Avenue which is south of my location. I was north of her

location.” He further testified that a motorist at Defendant’s location would have to make either a right or left turn; that it is a T intersection; that Defendant was on Roosevelt Avenue; that she made a right turn, going north, onto Mill Road; that there is no right turn signal at the traffic light; and that he could not actually see the control signal Defendant was facing. He next testified that there was nothing about the way Defendant pulled her car over that led him to believe she was intoxicated; that after Defendant pulled over, he approached her car; that he identified himself and advised Defendant “of her violations;” that he asked her to produce her license and registration; that there was nothing about the way she produced those documents that led him to believe she was under the influence of alcohol; that he made his observations about her condition as she handed over the documents; that the time was then about 12:20 a.m.; that the level of the odor of an alcoholic beverage was “moderate;” that he asked Defendant to step out of her car after she produced her license and registration; that she was unsteady on her feet when she stepped out of the car but that she was able to stand straight without any problems; that there was nothing about the way she walked to the sidewalk to perform “SFSTs” that indicated she might be under the influence of alcohol; and that she was able to recite the alphabet correctly. He also testified in more detail than on direct about Defendant’s performance on the remaining “SFSTs.” When questioned about Officer Poppe’s appearance at the scene, he testified he could not recall whether Officer Poppe had been diverted from another scene; that the lights on his (Officer Renick’s) unmarked car were on during the investigation; and that Defendant was placed under arrest at 12:50 a.m.

Officer Poppe testified that he was on duty on May 8, 2008, alone, in a marked police car; that he does not recall whether Officer Renick called him to the scene or he “just happened to be passing by;” that he “believe[s]” that when he arrived, “the driver” was in her vehicle, and Officer Renick was in his; and that “the women sitting at defense table wearing the tan jacket” was the driver of the pulled-over car. The People then asked that the record reflect that Officer Poppe identified Defendant as that driver, and I acknowledged that it could. Officer Poppe next testified that he “offered [Defendant] a PBT,” *i.e.* a “screening device that indicates if alcohol has been consumed by the subject;” that prior to administering the “PBT,” he asked Defendant whether and when she had been drinking; that he used a normal conversational tone; that he did not threaten Defendant in any way to induce her to speak; that he did not force her to speak; that he did not promise her anything in exchange for speaking; that his gun was

in its holster; that Defendant was not under arrest at the time he spoke with her; and that he did not arrest her. He did not actually testify on direct examination as to Defendant's answers to his questions, as to whether she took the portable breath test, or, if so, what the results were.

On cross-examination, Officer Poppe testified that he did not "remember witnessing any SFSTs;" that Defendant was placed under arrest some time after he conducted the portable breath test; that "whether [the arrest] was immediately subsequent or not, I don't know;" that he was on the scene "between five and ten minutes;" that the only things he observed that led him to believe Defendant was under the influence of alcohol were "the oral admissions and the results of the PBT;" and that he does not know the "exact time" he administered the PBT.

On redirect, Officer Poppe testified that the results of the portable breath test were "positive."

At the conclusion of the hearing, the People elected to "rely on the record," but on questioning by me, they tacitly urged that Defendant was not in custody when she made any of the statements they attribute to her. When I asked about the statement Defendant they by implication assert she made to Officer Poppe — delineated in a "710.30" notice as one to the effect that she had three glasses of wine at about 9:00 — they urged that because she made it prior to her arrest, it is a non-custodial one. They made reference to the "numerous" Vehicle and Traffic Law violations Officer Renick observed, even as they acknowledge that he testified only to the claimed illegal right turn. By a subsequently submitted memorandum, the People urged, among other things, that there was "some confusion" at the hearing occasioned by Officer Renick's testimony that he did not see that the light Defendant was facing was red, but that a "close reading" of the transcript — no part of which they cite — demonstrates that Officer Renick "could see the stop light at right angles to the stop light Defendant was facing and [one] could infer from that light being green that the light that Defendant turned on was red." Proceeding on the assumption that Officer Renick testified that he was actually on Old Central Avenue, the People submit a map with their memorandum. That map demonstrates that Mill Road runs north-south, that Old Central Avenue on which the People assert Officer Renick was stopped runs south-south-east and dead-ends into Mill Road, and that Roosevelt Avenue runs directly west and dead-ends into Mill Road at a point a notable distance south of where Old Central Avenue dead-ends — at an angle — into Mill Road.

For her part, Defendant urged, both in closing and by subsequently submitted memorandum, that there is no evidence to support the assumption that, because Officer Renick was facing a red light, she was, too, and that, therefore, the People failed to demonstrate that Officer Renick had a lawful basis for stopping her car. She further thereby urged that there was no testimony that she failed to come to a full stop before proceeding to turn right, and that, although Officer Renick testified that a “no turn on red” sign is “posted” at the intersection, neither he nor Officer Poppe established that the sign was posted in accordance with the New Code of Rules and Regulations and thus no proof that a right turn after a full stop is unlawful. She also thereby urged that her statements to Officer Poppe were made after she had been detained for some length of time and were, therefore, custodial. And she advanced the argument that, because neither of the People’s witnesses actually stated her name for the record, there is a failure to connect the person identified at the hearing with the person named in the accusatory instrument, and thus a concomitant failure to establish “probable cause” that she committed any offense whatsoever, thus requiring suppression of the evidence.

Defendant’s argument that suppression is required because the witnesses did not state her name on the record is without merit. Both witnesses identified the woman seated next to defense counsel as the person they encountered on the early morning of May 8, 2008. By allowing defense counsel to appear for “Lorraine Celentano,” that woman so seated thus effectively thereby represents to the court that she is named “Lorraine Celentano,” rendering a witness’ mouthing of her name superfluous. Moreover, were it really an issue, Defendant’s true identity is more properly one for trial. Indeed, the focus of a suppression hearing is not a defendant’s guilt or innocence, but whether police observed the constitutional requirements imposed upon them when investigating offenses and gathering evidence. It is my view that, under most circumstances, making sure that the witnesses utter the defendant’s name at a suppression hearing is not a burden the People bear. They do have others, however.

Because Defendant had been detained for some 30 minutes — during which time she was questioned, and subjected to and evidently failed standard field sobriety testing — by the time Officer Poppe arrived to question her and conduct a portable breath test, her argument that she was by then subjected to more than the brief, roadside detention that renders routine traffic stops “non-custodial” (*cf. People v. Mathis*, 136 AD2d 746, 523 NYS2d 915 [2d Dept. 1985])

is a compelling one. I need not, however, determine whether any of Defendant's statements are separately suppressible. Nor need I determine which side actually bears the burden on the issue of custody (*see People v. Brown*, 24 Misc3d 892, 885 NYS2d 168 [Sup Ct, New York County, 2009, Stone, J.; *People v. Colon*, 5 Misc3d 365, 784 NYS2d 316 [Sup Ct, New York County, 2004, Kahn, J.]; *People v. Mitchell*, 5 Misc3d 263, 781 NYS2d 196 [Sup Ct, Kings County, 2004, McKay, J.]; *People v. Salmon*, nor, 2006 NYSlipOp 52338U [Sup Ct, Kings County, 2006, Collini, J.]); *cf. People v. Alls*, 83 NY2d 94, 608 NYS2d 139 [1993]), for I conclude that the People have failed to meet their burden of coming forward with evidence demonstrating that the initial stop of Defendant's car was lawful (*see People v. Berrios*, 28 NY2d 361, 321 NYS2d 884 [1971]; *see also People v. Garafolo*, 44 AD2d 86, 353 NYS2d 500 [2d Dept. 1974]), thus rendering all evidence thereafter acquired — her statements, police observations of her after the stop, the results of field tests, the results of a chemical test of her breath — inadmissible (*see e.g., Wong Sun v. United States*, 371 US 471 [1963]; *People v. Cantor*, 36 NY2d 106, 365 NYS2d 509 [1975]).

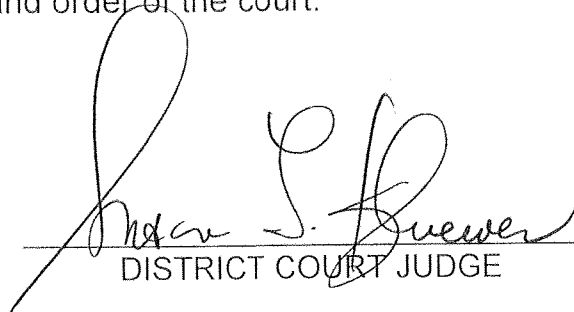
Although the People by their direct case somewhat disingenuously implied that Officer Renick and Defendant were on opposite sides of a single traffic light, the evidence establishes that their movements were governed by different traffic lights at different intersections some distance apart. Moreover, the People's assertion to the contrary notwithstanding, there is nothing in the record to suggest that Officer Renick, facing south-south-east at a point somewhat north of Defendant, could see any part of the traffic signal governing Defendant, proceeding west, and thus nothing to suggest that the light governing traffic going south on Mill Road was green so as to provide at least some support for an inference that the light governing Defendant at the intersection of Mill Road and Roosevelt Avenue was red when she turned right onto Mill Road going north. Indeed, it does not appear that traffic safety considerations would require that if the signal governing Officer Renick was red, so, too, must be the one governing Defendant. There is thus no demonstration that Defendant made an illegal right turn onto Mill Road.

Although Defendant is accused of violating several other provisions of the Vehicle and Traffic Law, since the People elected to rely only on Defendant's claimed violation of Vehicle and Traffic Law § 1111(d) — ironically described in the simplified traffic information as “passing steady red traffic signal light (without stopping)” rather than turning right on a red when a sign prohibits such turns (*see*

Vehicle and Traffic Law § 1111[d][2]) — and since they wholly failed to come forward with a demonstration that she violated any part of Vehicle and Traffic Law § 1111(d), I must conclude that the stop of her car was unlawful, thus requiring, as noted above, suppression of all after-acquired evidence.

This constitutes the decision and order of the court.

So Ordered:



Andrew J. Brewer
DISTRICT COURT JUDGE

Dated: March 2, 2010

CC: Honorable Kathleen Rice, District Attorney
Massimo & Panetta, P.C.

STK:blm