

**DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT CRIMINAL PART 8**

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff(s)

DOCKET NO. NA 16549/07

Present:

against

Hon. TRICIA M. FERRELL

FRANK A. KERZNER,

Defendant(s)

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Decision After Hearing

The defendant is charged with one violation of Vehicle and Traffic Law § 1192.2, Driving while intoxicated; Per se, in addition to the following: Driving with no insurance in violation of Vehicle and Traffic Law § 319.1, Leaving the scene of an accident without reporting in violation of Vehicle and Traffic Law § 600.1, No license in violation of Vehicle and Traffic Law § 509.1 and Uninspected motor vehicle in violation of § 306(b). On January 15, 2009, the parties conducted a *Mapp/Huntley/Dunaway* Hearing on consent. Police Officers David Jaskolski and Michael Calfayan testified on behalf of the People. Based upon the credible evidence, this Court makes the following findings of fact and conclusions of law.

Findings of Fact

This court finds the testimony of Police Officers David Jaskolski and Michael Calfayan credible. Police Officer David Jaskolski and Police Officer Michael Calfayan are both ten year veterans of the Nassau County Police Department.

Officer Jaskolski was assigned to routine patrol on July 7, 2007, when he became involved in an accident investigation at approximately 4:00 a.m., while patrolling Plandome Road in Manhasset. Officer Calfayan heard a "loud crash noise" and drove in the direction of the noise. As a result of a radio call, Officer Jaskolski also responded. Officer Calfayan observed a group of people near a bar pointing down the block; the area they were referring to was in the vicinity of Orchid Street, the rear of the parking lot for the Eckerd Store and there were

approximately twenty parking spaces. He went to the area and saw two vehicles substantially damaged; a Ford and a Infiniti. The officer spoke with the passenger of the Infiniti, who provided the defendant's name, a description of the defendant and said the defendant, who operated the Infiniti, took off because he was scared. Officer Calfayan put out a notification of the information he had via radio and Officer Jaskolski conducted a canvas of the immediate area; soon after he located an individual who matched the description. The officer approached this person who was "slouching down" behind a mail truck and asked him for his name and asked what he was doing. The defendant, Frank Kerzner, responded by giving his name to the officer. Albeit, the defendant was referred to as "Paul" by one witness during the hearing, both officers identified the defendant in court as the person they encountered on July 7, 2007. Officer Jaskolski radioed his information to the other officer. Shortly thereafter, Officer Calfayan arrived to the location and approached the defendant, asking him about the accident. The defendant admitted he was involved in an accident, the Infiniti was his and he left because he was scared. At the time the statement was made the aforementioned officers were the only two officers at the scene. Eventually other officers arrived. Officer Jaskolski was aware that Officer Mullick administered the Standardized Field Sobriety Tests [hereinafter "SFSTs"], however neither officer testified to observing the performance of the SFSTs. Thereafter, the defendant was placed under arrest.

Conclusions of Law

Officer Jaskolski's role in the investigation was to locate the driver of the Infiniti. Upon observing a subject who matched the description given to the officer and was crouching down by a mail truck, the officer asked his question. Officer Jaskolski's brief questioning of the defendant took place in close proximity [walking distance] to the scene where the incident occurred. Officer Jaskolski lawfully approached the defendant to ask reasonable questions in a public place. *People v Kmita*, 139 Misc.2d 63, 526 N.Y.S.2 742. This question was not only reasonable in light of the surrounding facts and circumstances, but it was well within the bounds of investigatory questioning. Here, approaching the defendant would amount to a minimal intrusion to request information. Once the defendant identified himself to Officer Jaskolski, the officer notified his colleagues via radio

transmission that he found the defendant. Soon after, Officer Calfayan arrived by foot to that location and asked the defendant what happened. Based on the information received from the defendant's passenger, coupled with the observations of the damaged vehicles, the officer was justified in continuing the investigation and requesting additional information from the defendant. People v. Schook, 16 Misc.3d 1113(A), 2007 WL 2108043. There was no evidence at the hearing to suggest that the defendant's statements were obtained by means of coercion or unfairness; he was not cuffed, no weapons were drawn, no promises were made and no threats were used. Therefore the defendant's statements made at Orchid Street are not subject to suppression at trial.

Based upon the officer's observations and the defendant's statements, there was sufficient evidence to provide the officer with reason to believe the defendant had left the scene of an accident and probable cause to charge the defendant with violating Vehicle and Traffic Law § 600.1. Typically, under these circumstances, that being a sole charge of a traffic infraction, the defendant would be issued a traffic summons versus a custodial arrest. If an officer is unable to ascertain the identity of the defendant, then it would be constitutionally permissible to take him into custody. People v. Brito, 4 Misc.3d 1004(A), 2004 WL 1488404. However, Officer Calfayan was able to verify the defendant's identity.

The defendant was also placed into custody for violating Vehicle and Traffic Law § 1192.2. Vehicle and Traffic Law § 1194.2(a)(1) provides that a chemical test is authorized at the direction of a police officer having reasonable grounds to believe a person operated a motor vehicle in violation of § 1992 or 1192a. Reasonable grounds, as defined in § 1194.2(a)(3) is determined by viewing the totality of the circumstances surrounding the incident, which may include visible or behavioral indication of alcohol consumption by the operator, the existence of an open alcohol container or any other evidence indicating the operator consumed alcohol prior to operating a motor vehicle. No such evidence was presented throughout the hearing to establish the probable cause for arresting the defendant for violating Vehicle and Traffic Law § 1192.2. Hence, there is no sufficient basis to rule that reasonable grounds existed to authorize the chemical test of the defendant. Therefore, the chemical test results and

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subsequent evidence obtained after the defendant was placed in custody are deemed inadmissible.

This constitutes the decision and the order of the Court.

So Ordered:


DISTRICT COURT JUDGE

Dated: March 24, 2009

CC: Honorable Kathleen Rice, District Attorney
Nicholas Massimo, Esq.

TMF:blm