The People of the State of New York, Plaintiff v. Bruce Borzon, Defendant, 3434-2013

November 21, 2014

- Supreme Court, Bronx County, Criminal Term, Part 16
- Justice Richard Lee Price

Cite as: The People v. Borzon, 3434-2013, NYLJ 1202676944871, at *1 (Sup., BX, Decided November 14, 2014)

3434-2013

Justice Richard Lee Price

Read Summary of Decision

Decided: November 14, 2014

ATTORNEYS

For Plaintiff: Justin Siebel, Assistant District Attorney.

For Defendant: Brendan Ahern Esq., Steven Epstein Esq., Barket Marion Epstein & Kearon LLP.

DECISION AND ORDER[1]

I. Background and Procedural Posture

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Defendant is charged with four counts of operating a motor vehicle while under the influence of alcohol (Vehicle and Traffic Law §1192 [3] as an "E" felony, a "D" felony, and a misdemeanor; and Vehicle and Traffic Law §1192 [1]). Defendant moved, among other things, for suppression of statements made by him and his refusal to submit to a chemical breath analysis on the basis that they were unlawfully obtained in violation of the Fourth Amendment of the United States Constitution and article I, §12, of the New York State Constitution, claiming they were improper and fruits of an unlawful arrest.

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Specifically, the defendant contends that: (1) his arrest was not supported by the requisite probable cause; (2) there was an insufficient basis to request he submit to a chemical breath test; (3) the refusal warnings provided

were not clear and unequivocal; (4) any refusal was not persistent as required by Vehicle and Traffic Law 1194 (2) (f); (5) his statements made to the IDTU officer immediately preceding his purported refusal are subject to Criminal Procedure Law §710.30 (1) (a) preclusion; (6) such statements were the product of a custodial interrogation and obtained without Miranda warnings; (7) failure to procure any and all Emergency Medical Service (EMS) reports constitutes a Rosario violation; and, (8) destruction of the 911 tape requires an adverse inference charge.

The District Attorney contends that the defendant's arrest was based upon sufficient probable cause, that there was a legally sufficient basis upon which to administer the Intoxilyzer test, that both the refusal warnings and defendant's refusal was entirely proper, that any statements made in connection with the administering of an Intoxilyzer test or the refusal to do so are neither subject to CPL 710.30 (1) (a) notice nor Miranda, and an adverse inference charge concerning the 911 tape's destruction is unwarranted.

On September 8, 2014, this court commenced a combined Huntley/Dunaway/Refusal hearing.[2] The hearing continued, and concluded, on September 15, 2014. The People called one witnesses: Police Officer Martin Neff

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(PO Neff), assigned to the 43 Precinct. This court finds the testimony of PO Neff credible to the extent indicated herein. The defendant did not call any witnesses. Upon the close of testimony, this court heard oral argument from both the defendant and the People, and adjourned the matter until October 22, 2014, for decision. Pursuant to defense counsel's request, however, this court, by interim decision and order dated October 2, 2014, denied defendant's CPL 710.30 (1) (a) preclusion claim.[3] On October 22, 2014, this court received a supplemental memorandum of law from the defendant in connection with his suppression claim arguing that such statements were the product of a custodial interrogation obtained without Miranda warnings. Based upon the evidence presented, the parties' arguments, and their written post-hearing memoranda, this court finds that the defendant's arrest was supported by probable cause, that there was a reasonable basis to request he submit to a chemical blood-alcohol breath test, that his statements made to the IDTU officer were neither subject to CPL 710.30 (1) (a) preclusion nor the product of a custodial interrogation, and that that People's failure to provide EMS reports did not constitute a Rosario violation. As such, these branches of defendant's motion are denied. With regard to the defendant's purported refusal to take the Intoxilyzer chemical breath test, however, this court finds the refusal warnings were not clear

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and unequivocal. All evidence and testimony relating to such refusal is therefore suppressed. Finally, this court also grants defendant's application for an adverse inference charge relating to the destruction of the 911 audiotape recording.

II. Findings of Fact

On August 26, 2012, at approximately 3:25 a.m., PO Neff, dressed in full uniform and working with his partner, PO Schmidt, responded to Thieriot Avenue and Guerlain Street in Bronx County pursuant to "a call of an unconscious male in a vehicle" (H. 12). PO Neff testified that upon arriving, he observed the defendant alone, sitting behind the wheel of a Toyota with the keys in the ignition and the engine running (H. 59). EMS was also on the scene. No other occupants were in the vehicle. PO Neff observed the Toyota positioned at approximately a 90 degree angle into "the middle of roadway…several inches away from another vehicle" (H. 11-13).

PO Neff observed the defendant to be in a stupor, and noticed a heavy smell of alcohol. He testified that the defendant was unable to answer questions (H. 13). Additionally, because the driver's side of the vehicle was wedged against an obstruction, the officers positioned themselves on the passenger side to determine whether the defendant needed medical attention. PO Neff noted that while the vehicle was in park, an EMS attendant indicated that upon their arrival, the vehicle was in gear and an EMS attendant had placed it in park (H. 13-14).

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Upon attempting to communicate with the defendant, PO Neff stated that he was incoherent, had slurred and indecipherable speech, and in response to the request for his license and registration, the defendant handed PO Neff his credit card. After being extricated from the vehicle through the passenger side, the defendant was "unable to stand" on his own requiring POs Neff and Schmidt to "physically hold him up." In so doing, PO Neff stated the defendant was "directly next to me…[and] had a very heavy odor of alcohol" (H. 15). At no time was the defendant asked about his medical history, or whether he required immediate medical attention (H. 15, 73-74, 90). But having made these observations, and based on his training and experience, PO Neff concluded that the defendant was intoxicated. At approximately 3:44 a.m., PO Neff placed the defendant under arrest for operating a motor vehicle while under the influence of alcohol (H. 16-17).

After being placed under arrest, the defendant was transported to the 45 Precinct at approximately 4:10 a.m. for the purpose of administering an Intoxilyzer breath test. PO Neff stated that upon arriving, the defendant "wasn't able to hold himself up, so my partner and I physically had to carry him into the 45 Precinct." Once inside, New York City Police Department Highway Patrol Officer Cardamone (PO Cardamone) initiated the breath test by asking:

PO Cardamone: Sir, can you stand on your own free will?

Defendant: No.

PO Cardamone: No, you can't stand up?

Defendant: Nope.

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PO Cardamone then offered the defendant an opportunity to submit to an Intoxilyzer breath test at approximately 5:00 a.m., which was preserved on videotape (H. 17-18).[4] The videotape reflects that the defendant responded by asking, "Um…Do I? Should I?…I don't know." PO Cardamone then stated:

Okay, at this time I'm going to read you the second portion of this. If you refuse to submit to the test or any portion thereof, it will result in immediate suspension or subsequent revocation of your driver's license or operating privileges whether or not you're found guilty of the charges of which you've been arrested. In addition, your refusal to submit to the test or a portion thereof can be introduced as evidence against you at trial or hearing resulting from the arrest. I'll ask you again, do you want to take the test?

The following colloquy then occurred:

Defendant: I don't know. Help.

PO Cardamone: My job is not to help you, sir. You have to make that decision on whether or not you want to take the test.

Defendant: I don't…Whatever you say.

PO Cardamone: I can't go on "whatever I say." What I said is, if you refuse to take it, your license will be revoked.

Defendant: Really?

PO Cardamone: Yes. Do you want to take the test?

Defendant: No.

PO Cardamone: No?

Defendant: That would be bad, right?

PO Cardamone: You have to make that decision, sir.

Defendant: No.

PO Cardamone: So you won't take the test.

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Defendant: No.

III. Conclusions of Law

1. Probable Cause

CPL 140.10 (1) (b) provides, "[s]ubject to the provisions of subsection two, a police officer may arrest a person for: A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise." Probable cause, or reasonable cause, does not require proof "sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed…The legal conclusion is to be made after considering all of the facts and circumstances together" (People v. Bigelow, 66 NY2d 417, 423 [1985], quoting People v. McRay, 51 NY2d 594, 602; see also People v. Maldonado, 86 NY2d 631, 635 [1995]).

At a suppression hearing, the People have the burden of presenting evidence of reasonable cause to show the legality of the police conduct (People v. Baldwin, 25 NY2d 66 [1969]; People v. Malinsky, 15 NY2d 86 [1965]). The People must, therefore, demonstrate that the police acted with probable cause when they arrested the defendant (People v. Bouton, 28 NY2d 130 [1980]; People v. Berrios, 28 NY2d 361 [1974]). Once this burden has been met, the defendant is responsible for proving the conduct was illegal (Berrios, 28 NY2d at 361; Baldwin, 25 NY2d at 66).

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Evidence obtained by an unconstitutional search is inadmissible and vitiates conviction (see Mapp v. Ohio, 367 US 643 [1961]).

In sustaining their burden, the People must demonstrate that the circumstances authorized the officer's behavior. In assessing the scope of intrusion permissible under a given set of circumstances, the New York Constitution contemplates weighing the officer's safety and the public interest against the individual's personal liberty (People v. De Bour, 40 NY2d 210 [1976] [citing Terry v. Ohio's federal requirement of balancing the interests involved in a police inquiry]). In contrast to the Federal Constitution's emphasis on officer safety in search and seizure matters, the New York Constitution affords greater protection to an individual's privacy (see Peter Preiser, 2010 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 140.50). Accordingly, New York has adopted standards considerably more protective of individual liberty than federal precedent mandates (id.).

De Bour establishes the basic framework for measuring the intrusiveness of a police action in New York (id.). The first level of intrusion permits a law enforcement officer to approach a citizen and request information provided there is an objective, credible, and articulable reason to do so (id. at 223). The second level, the common-law right of inquiry, permits a momentary stop when there is a "founded suspicion that criminal activity is afoot" (id.). Under the third level, an officer may forcibly stop and detain a person when such officer has a reasonable suspicion that the individual has committed, is committing, or is about to commit a

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felony or misdemeanor (id.). Finally, an officer may initiate an arrest when there is probable cause to believe that an individual has committed, is committing, or is about to commit a crime (id.).

Regarding automobile stops, the police must possess an articulable basis for requesting information from occupants of a vehicle that has been approached but not seized (People v. Ocasio, 85 NY2d 982 [1995]). In other words, there must be an objective, credible reason not necessarily indicative of criminality (id.). Initial questioning, limited to a request for identification, is consistent with a request for information (People v. Hollman, 79 NY2d 181, 185, 191 [1992]). Therefore, an officer's demand for a license constitutes a level-one request for information (People v. Thomas, 19 AD3d 32 [1st Dept 2005]).

Here, the People presented sufficient evidence that the approach of the defendant was proper based upon the observations of PO Neff. He observed the defendant seated behind the steering wheel of a vehicle positioned at a 90 degree angle jutting into the street. PO Neff further observed the defendant, who was the sole occupant of the vehicle, unresponsive and disoriented with a strong odor of alcohol emanating from him. He was unable to answer questions, and provided his credit card to PO Neff in response to a request for his driver's license.

Defendant contends that because of the absence of any testimony that he placed the vehicle in motion or demonstrated an intention of doing so, the People failed to establish the operation element of VTL 1192. It is true VTL 1192 requires the People to establish "upon proof beyond a reasonable doubt that Defendant had

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recently driven the vehicle or by proof he was seated at the wheel with…a present intention of placing the vehicle in operation" (e.g., People v. Ramsey, 35 Misc 3d 1213(A), *4 [Sup Ct, Bronx County 2012, Massaro J.]; People v. Dalton, 176 Misc 2d 211, 213 [2d Dept 1998]). "Operate" under VTL 1192, however, is broader than "drive." Operation of a motor vehicle simply requires "proof that the defendant was merely behind the wheel with the engine running without need for proof that defendant was observed driving the car, i.e., operating it so as to put it in motion" (People v. Alamo, 34 NY2d 453, 458 [1974] citing People v. Marriott, 37 AD2d 868 [3d Dept 1971]; Matter of Tomasello v. Tofany, 32 AD2d 962 [2d Dept 1969], lv denied 25 NY2d 742 [1969]; Matter of Prudhomme v. Hults, 27 AD2d 234 [3d Dept 1967] and cases cited therein; People v. Ceschini, 63 Misc 2d 15 [Crim Ct, Queens County 1970, Berger J.]; James O. Pearson, Jr., Annoation, What Constitutes Driving, Operating, or Being in Control of a Motor Vehicle for Purposes of Driving While Intoxicated Statutes or Ordinances, 93 ALR 3d 7 §III).

Given this standard, the record reflects sufficient evidence that defendant was seated behind the wheel of the car with the engine running. PO Neff's observations along with the attendant circumstances provide him with reasonable suspicion that the defendant was intoxicated, and had recently committed a violation of the Vehicle and Traffic Law (see DeBour, 40 NY2d at 223; People v. Ingle, 36 NY2d 413 [1975]). His conclusion, then, that the there was probable cause to arrest the defendant for operating a motor vehicle while intoxicated was entirely justified (see Bigelow, 66 NY2d at 423; People v. Goodell, 164 AD2d 321, 323-324

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[4th Dept 1990]; affd, 79 NY2d 869 [1992]; People v. Farrell, 89 AD2d 987, 988 [2d Dept 1982]). Accordingly, there was no need for the People to provide proof the defendant had been observed driving the vehicle, or demonstrate his intention to place it in motion.

Based upon PO Neff's observations, there was reasonable cause to believe the defendant had operated a motor vehicle while intoxicated. It follows, then, that his arrest, and PO Cardamone's request that he submit to a chemical blood-alcohol breath test were proper (see People v. Johnson, 134 Misc 2d 474 [Crim Ct, Queens County 1987, Johnson J.]). Defendant's challenge to the legality of his stop and arrest therefore fails.

2. Refusal

a. Clear and Unequivocal

Regarding defendant's alleged refusal, the People bear the burden of establishing that the defendant refused to submit to a chemical test (People v. Camagos, 160 Misc 2d 880, 881 [Sup Ct, Queens County 1993, Yellen, J.]). To meet this burden, however, the People are not required to disprove every possible fact that might weigh in favor of suppression (People v. Womack, 18 Misc 3d 1135 [A] [Crim Ct New York County 2008, Whiten, J.]).

Pursuant to VTL 1194 "evidence of a refusal to submit to such chemical test" is admissible at trial "based upon a violation" of VTL 1192 "upon a showing that the person was given sufficient warning, in clear and unequivocal language," of the

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ramifications of refusal and "the person persisted in the refusal," (VTL 1194 [2] [f]). The warning must notify the person that their license "shall be immediately suspended and subsequently revoked for refusal to submit to such chemical test or any portion thereof," (VTL 1194 [2] [b] [1]).

Courts have permitted the People to use evidence of a refusal to submit to a chemical test as consciousness of guilt evidence where a defendant charged with driving while intoxicated was warned of the consequences of doing so in clear and unequivocal language (People v. Reynolds, 133 AD2d 499 [3d Dept 1987]; People v. Coludro, 166 Misc 2d 662 [Crim Ct Kings County 1995, Ruchelsman, J.]). The clear and unequivocal language requirement "is viewed in the eyes of the person who is being told the warnings," (People v. Lynch, 195 Misc 2d 814, 817 [Crim Ct Bronx County 2003, Clark, J.]). At a minimum, there must be a showing that "through words or actions, defendant declined to take a chemical test despite having been clearly warned of the consequences of refusal" (People v. Smith, 18 NY3d 544, 551 [2012]).

The issue, then, is whether the defendant understood them, not whether the police officer read the warnings verbatim from the statute (Lynch, 195 Misc 2d at 818). Of course, if an individual does not understand the

warning, the arresting officer may, if he chooses to, explain it in layman's terms (People v. Cousar, 226 AD2d 740, 741 [2d Dept 1996]). But the officer must do so correctly because an incorrect explanation "violate[s] the requirement that the petitioner be warned in clear or unequivocal language," (Gargano v. New York State Dept. of Motor Vehicles,

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118 AD2d 859 [1986]). Failure to do so renders a subsequent refusal to submit to chemical testing inadmissible (see, e.g. People v. Boon, 71 AD2d 859, 860 [2d Dept 1979]; Matter of Harrington v. Tofany, 59 Misc 2d 197, 199 [Sup Ct Warren County 1969, Sweeny J.]).

If, however, an individual cannot fully comprehend "the consequences of his refusal because he was so intoxicated," the court will not raise the degree of explanation required. To do so would "lead to the absurd result that the greater the degree of intoxication…the less the degree of his accountability" (Matter of Carey v. Melton, 64 AD2d 983, 983 [1978]; cf Matter of Jentzen v. Tofany, 33 AD2d 532 [1969] [annulling a DMV refusal revocation where "petitioner did not make an understanding refusal to take the test"]).

A review of the IDTU videotape recording reflects that PO Cardamone initially provided the defendant with a clear and unequivocal warning of the consequences associated with refusing to take the Intoxilyzer breath test. In fact, it appears PO Cardamone read them directly from a card. As indicated above, the defendant's response exhibited confusion, hesitation and indecision. When PO Cardamone indicated to him that he had to make a decision, the defendant replied, "I don't…Whatever you say." Thus far, there was no infirmity with the warnings.

But when PO Cardamone responded "I can't go on 'whatever I say[,]' [w]hat I said is, if you refuse to take it, your license will be revoked," he effectively transformed an otherwise clear, complete and unequivocal warning to one that was unclear, incomplete and inaccurate. By referencing the license revocation

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consequence in such a conclusory fashion, entirely omitting that evidence of his refusal may be used against him at a hearing or trial, it appears defendant's response of "Really?…That would be bad, right?" was directed merely at the consequence of license revocation. Worse, when juxtaposed with PO Cardamone's prefatory comment, "What I said is," not only was materially deficient, it substantially misrepresented the warnings PO Cardamone initially provided. In fact, that is not what PO Cardamone had just stated. Such a splintered explanation of those warnings cannot possibly give rise to the reasonable inference that when the defendant ultimately declined to take the test, he did so upon a clear, complete and unequivocal warning. The flawed warning, therefore, "vitiated the validity of the printed warning initially administered to the defendant" (People v. Singh, 26 Misc 3d 1234[A], *3, [Dist Ct, Nassau County 2010, Ferrell, J.]).

b. Persistent

In light of this court's finding that the warning was deficient, whether his refusal was persistent is academic. Nevertheless, evidence of a defendant's refusal must be "persistent" to be admissible (VTL 1194 [2] [f]). A refusal is considered persistent if the defendant was "offered a minimum of two opportunities to submit to the chemical test, at least one of which must take place after being advised of the sanction for refusal [internal citation omitted]" (People v. Pagan, 165 Misc 2d 255, 261 [Crim Ct, Queens County 1995, Gavrin, J.]). A refusal may consist of words or conduct (People v. Massong, 105 AD2d 1154, 1115 [4th Dept 1984]), but "mere silence cannot be deemed a refusal" absent a warning that such silence would

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constitute a refusal (People v. Niedzwiecki, 127 Misc 2d 919, 920 [Crim Ct, Queens County 1985, Flug, J.]). Here, the IDTU videotape shows defendant refusing to take the test three times. The problem for the People, however, is that all three occurred after the flawed explanation of the consequences of doing so, which was not remedied by the subsequent administration of a proper warning (see Singh, 26 Misc 3d at *3). Such failure requires that PO Cardamone's refusal warning, defendant's subsequent refusal, all related statements, the IDTU videotape, and any corresponding evidence or testimony be suppressed.

3. CPL 710.30 (1) (a) Notice

Criminal Procedure Law §710.30 (1) requires the People to provide a defendant with notice of their intention to offer at trial "evidence of a statement made by a defendant to a public servant" (CPL 710.30 [1] [a]). Such notice, however, is required only where the statement consists of "a record or potential testimony reciting or describing a statement of such defendant involuntarily made" (CPL 710.20 [3]). A statement is "involuntarily made" when it is: A statement is "involuntarily made" when it is:

obtained from him…(b) By a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him: (i) by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself; or (ii) in violation of such rights as the defendant may derive from the

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constitution of this state or of the United States" (CPL 60.45 [2]).

The contention, however, that the People's failure to provide notice of statements made immediately prior to and in connection with either the chemical blood-alcohol test or a refusal to take it is without merit. Since "there is no compulsion on a defendant to refuse to submit to the chemical test provided for in Vehicle and Traffic Law §1194 (2), the defendant has no constitutional privilege or statutory right to refuse to take the test [internal citation omitted]" (People v. Peeso, 226 AD2d 716, 717-18 [1999]). As such, defendant's statements

at the onset of the chemical test and his refusal to take it, regardless of whether they constitute communicative or testimonial evidence (see People v. Thomas, 46 NY2d 100, 106 [1977]), cannot be considered "involuntary" within the meaning of CPL 60.45. They do not, therefore, implicate the notice requirement of CPL §710.30 (1) (a) (Peeso, 266 AD2d at 718).

In any event, the defendant was provided with adequate notice pursuant to CPL 710.30, which requires the People to serve the defendant with notice of its intention to offer any statements within "fifteen days after arraignment and before trial" (CPL 710.30 [2]). Here, on or about February 25, 2013, the People served the defendant with the IDTU videotape containing the defendant's statements. On November 15, 2013, defendant was arraigned on the indictment. Thus, the People effectively provided the defendant with notice of the People's intention to use those

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statements two hundred and sixty three days before being required to do so under CPL 710.30 (Brief in Opposition to Defendant's Motion, 5).

With respect to the sufficiency of such notice, this court notes that a complete or verbatim transcript of the statement need not be supplied (People v. Lopez, 84 NY2d 425, 428 [1994]. Rather, the People need only describe the statements sufficiently so that the defendant can intelligently identify the statement as well as the time, place and manner in which it was made (id.). Providing the defendant with a video recording of his statements certainly comports with this standard, which is to allow for "a timely motion to suppress" (People v. Rodney, 85 NY2d 289, 291 [1995]).

4. Statements

Fundamental to American jurisprudence is the precept that any custodial interrogation conducted by law enforcement agents must be preceded by the warnings enunciated by the Supreme Court of the United States in Miranda v. Arizona (384 US 436 [1966]). Specifically, such agents must inform a person in custody of his right to remain silent and to have an attorney present during any questioning (id). A suspect may, of course, waive his Miranda rights by voluntarily, knowingly, and intelligently relinquishing those rights after having been made aware of them (People v. Anderson, 42 NY2d 35 [1977]; People v. Leonti, 18 NY2d 384 [1966], cert denied 389 US 1007 [1967]; People v. Medina, 123 AD2d 331 [2d Dept 1986]). The burden, however, of establishing the voluntariness of a suspect's

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statement beyond a reasonable doubt at a Huntley hearing is on the People (People v. Holland, 48 NY2d 861 [1979]; Anderson, 42 NY2d 35; People v. Huntley, 15 NY2d 72 [1965]), and here, this courts finds they satisfied it.

a. Custody

In deciding whether a defendant was in custody prior to receiving his warnings, the subjective beliefs of the defendant are not to be the determinative factor. The test is not what the defendant thought, but rather what a reasonable man, innocent of any crime, would have thought had he been in the defendant's position (People v. Yukl, 25 NY2d 585, 589 [1969]; People v. Rodney P., 21 NY2d 1 [1969]; People v. DeJesus, 32 AD3d 753 [1st Dept 2006]; People v. Robbins, 236 AD2d 823 [4th Dept], lv denied 90 NY2d 863 [1997]; People v. Lynch, 178 AD2d 779, 781 [3d Dept 1991), lv denied 79 NY2d 949 [1992]).

In making such an assessment, courts must consider the "totality of the circumstances" (People v. Centano, 76 NY2d 837 [1990]; see also Minnesota v. Murphy, 465 US 420 (1984). Among such circumstances is whether the defendant voluntarily appeared at, or accompanied officers to, the police precinct and whether questioning is conducted in a non-coercive atmosphere (People v. Acquaah, 167 AD2d 313 [1st Dept 1990], app denied 78 NY2d 961 [1991]; People v. Davis, 161 AD2d 395 [1st Dept], app denied 76 NY2d 955 [1990]). Based on this court's findings of fact stated above, it is axiomatic that once the arresting officers transported the defendant to the precinct and physically assisted him inside, he was in custody.

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b. Interrogation

A suspect is subjected to interrogation when he is confronted with "express questioning or its functional equivalent" (Rhode Island v. Innis, 446 US 291 [1980]). The "functional equivalent" of express questioning is "words or actions on the part of the police…that the police should know are reasonably likely to elicit an incriminating response from the suspect" (Innis at 301). The Court of Appeals similarly held that

[w]hat constitutes "interrogation" of a suspect…is determined not by the subjective intent of the police, but by whether an objective observer with the same knowledge concerning the suspect as the police had would conclude that the remark or conduct of the police was reasonably likely to elicit a response (People v. Ferro, 63 NY2d 316 [1984], cert denied 427 US 1007 [1985]).

Statements made at a preliminary stage of an investigation in response to a law enforcement agent's general inquiry are not usually considered the product of an interrogation (People v. Johnson, 59 NY2d 1014 [1983]; People v. Chestnut, 51 NY2d 14 [1980]; People v. Huffman, 41 NY2d 29 [1976]). Also exempted from interrogation are spontaneous statements that were essentially forced upon law enforcement agents and not the product of any inducement, provocation, encouragement or acquiescence on their part (People v. Maerling, 46 NY2d 289 [1978]).

As to the propriety of the defendant's statement immediately preceding his refusal, this court concludes that they were not the product of a custodial interrogation (see People v. Zapata, 41 AD3d 109 [1st Dept 2007]; People v. Garcia,

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19 AD3d 200 [1st Dept 2005]). Statements made by the defendant in connection with administering a coordination or chemical blood-alcohol content breath test need not be preceded by Miranda warnings, and, a videotape of such tests, including any colloquy between the test giver and the defendant not constituting custodial interrogation, is admissible (People v. Jacquin, 71 NY2d 825 [1988]). A contrary finding would require this court to necessarily accept that PO Cardamone's question concerning the defendant's ability to stand was intended to elicit an incriminating response, despite knowing that he could not. That, in turn, would have triggered the Miranda obligation.

Having viewed the videotape in this case, this court finds the statement defendant made to PO Cardamone immediately preceding his request that the defendant submit to the Intoxilyzer test were colloquy relating to it. Indeed, it is precisely because of this analysis that defendant's statement was part and parcel of the request to take the Intoxilyer test, not the product of a question designed to elicit an incriminating response. Accordingly, defendant's statement that he was unable to stand did not constitute a custodial interrogation. Being part of defendant's ostensible refusal, then, this statement must be suppressed along with evidence of his purported refusal.

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5. EMS Reports

Defendant asserts that the Peoples' failure to turn over alleged statements memorialized in an EMS report by first responders constitutes a Rosario violation (see People v. Rosario, 9 NY2d 286 [1961]). This court disagrees. First, statements made or reports generated employees of other State agencies are "not within the control of" the People for Rosario purposes (People v. Kelly, 88 NY2d 248, 248 [1996]; see also, People v. Howard, 87 NY2d 940, 941 [1996] [Department of Correctional Services has "no duty to share such material with the District Attorney"]; People v. Washington, 86 NY2d 189 [1995] [statements in custody in OCME do not constitute Rosario materials because the People "do not exert sufficient control over OCME to require production"]). An EMS report, if it exists, is not, therefore, within the control of the District Attorney's Office; EMS has no duty to share any reports with the People, and the People lack authority to demand their production. Failure to produce the alleged EMS report, then, cannot constitute a Rosario violation.

6. Destruction of 911 Audiotape Recording

When discoverable evidence is lost or destroyed by the prosecution or its agents, the People have the burden of demonstrating that good faith efforts were made to prevent such loss (People v. Kelly, 62 NY2d 516, 520 [1984]). The People must also establish that the defendant suffered little or no prejudice as a result (see People v. Diaz, 47 AD3d 500 [1st Dept 2008]). Still, "[p]reclusion of evidence is a severe sanction, not to be employed unless any potential prejudice arising from the

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failure to disclose cannot be cured by a lesser sanction" (People v. Jenkins, 98 NY2d 280, 284 [2002]). Specifically relative to the destruction of a 911 audiotape, courts have held that such destruction is unreasonable when the defendant makes a timely demand for its preservation and production (People v. Burch, 247 AD2d 546, 547 [2d Dept 1998]). Indeed, a demand made within thirty days of the occurrence and or arrest, the government's destruction of radio communication tapes is considered institutionally purposeful (People v. Bramble, 158 Misc 2d 411, 418 [Sup Ct, Kings County 1993] affd 207 AD2d 407 [2d Dept 1994] [evidence established tapes are routinely held for ninety days, after which only the Sprint reports are held]). Here, the defendant demanded of the People that they take measures to preserve the 911 tape within thirty days of his arrest. It appears, however, that the People made no effort, indeed took no action, to insure it was. Such inaction, particularly in light of defendant's timely demand, is both unreasonable and inexcusable.

Regarding prejudice, courts primarily consider the purpose and manner in which defense counsel would have used the destroyed tape. In Diaz, the court found "[d]efendant's claim that the 911 recording would have assisted in his defense, by demonstrating the victim's state of mind…[was] speculative" (Diaz, 47 AD3d at 500). Accordingly, denial of defendant's application for sanction was proper. Where, however, identification was an issue and the radio communication tapes contained the witness' description of the perpetrator provided contemporaneous

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with the crime's occurrence, the defendant is certainly prejudiced by their destruction (Burch, 247 AD2d at 546).

Unlike Burch, the 911 call in this case was placed by an anonymous individual. Notably, defense counsel neither seeks to identify nor call that person as a witness. Rather, he merely wishes to use such information in undermining the basis for the responding officer's approach and arrest subsequent arrest of the defendant. Because the officer conceded that his information from the dispatcher was an unconscious male inside a vehicle, any prejudice from being unable to do so by the tape's destruction is minimal. As such, the question is what the appropriate sanction is for the People's failure to preserve it.

Instructive here is the availability and production of the Sprint report of the 911 call, which the People provided. If "[i]t is clear that the People's conduct did not evince bad faith" in the destruction of a 911 tape when defense counsel timely subpoenaed the tape, a Sprint report may suffice as a substitute (People v. Figueroa, 156 AD2d 322, 323 [1st Dept 1989]). Although the Sprint report "might not be a verbatim transcript of the 911 tape," possession of the Sprint report as well as other evidence introduced at trial prevents the defendant from being "entirely deprived of the evidence which he sought" (Figueroa, 156 AD2d at 323). Under

such circumstances, an adverse instruction was sufficient (People v. Brister, 239 AD2d 513 [2d Dept 1997] [though not required, in the absence of bad faith and prejudice to the defense, adverse inference is nevertheless appropriate even where the People

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preserved the first 911 call but inadvertently destroyed the second, and even where the People produced a printout of the destroyed tape's Sprint report]).

It is axiomatic, then, with defendant's timely demand, the People's unjustified failure to exercise any effort to preserve 911 tape, even the most minimal of prejudice warrants an adverse inference instruction concerning its contents.

IV. Conclusion

Viewing the evidence in the light most favorable to the People (see People v. Williams, 84 NY2d 925 [1994]; see also People v. Contes, 60 NY2d 620 [1983]), this court finds that the defendant's arrest was supported by probable cause, that there was a reasonable basis to request he submit to a chemical blood-alcohol breath test, that his statements made to the IDTU officer were neither subject to CPL 710.30 (1) (a) preclusion nor the product of a custodial interrogation, and that that People's failure to provide EMS reports did not constitute a Rosario violation. As such, these branches of defendant's motion are denied.

With regard to the defendant's purported refusal to take the Intoxilyzer chemical breath test, however, this court finds the refusal warnings were not clear and unequivocal. All evidence and testimony relating to such refusal is therefore suppressed. Finally, this court also grants defendant's application for an adverse

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inference charge relating to the destruction of the 911 audiotape recording.

This shall constitute the decision and order of this court.

Dated: November 14, 2014

ENTER

1. This court gratefully acknowledges the assistance of Samuel Goldfine, a student at Brooklyn Law School, and Michael Lombardi, a student at New York University's School of Law, both chambers interns, in preparing this decision.

2. By decision and order dated January 23, 2014, Justice Troy Webber, in deciding defendant's omnibus motion, ordered that a combined pre-trial Huntley/Dunaway and Refusal hearing be conducted.

3. An expanded analysis of this decision is incorporated in this decision and order.

4. Excerpts of the colloquy between PO Cardamone and the defendant were taken from the transcript accompanying the videotape recording. Because transcripts of recorded conversations in English are not evidence, however, this court examined the transcript commensurate with reviewing the videotape recording. Such review indicates this accurately reflects those portions of their communication. The Hearing record references, then, relate to PO Neff's testimony of the recorded events, for which he was present (H. 19-23, 83-85).