

BEFORE: HON. ADRIAN N. ARMSTRONG  
CITY JUDGE OF MOUNT VERNON

CITY COURT OF MOUNT VERNON  
MOUNT VERNON : NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

-vs-

DECISION AND ORDER  
Docket CR 9437-18

AVRIEL HILLMAN,

Defendant.

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The defendant is charged with one (1) count of Driving While Intoxicated in violation of VTL § 1192(2); one (1) count of Driving While Intoxicated in violation of VTL § 1192(3); one (1) count of Moving from Lane Unsafely in violation of VTL § 1128(A); and one (1) count of Impeding Traffic By Driving Too Slow in violation of VTL § 1181(A). A *Huntley/Dunaway/ Mapp* hearing was granted.

On May 15, 2019, August 7, 2019 and September 9, 2019 the Court conducted the aforementioned hearings. The People called as its witnesses Police Officers Peter Carcaterra and Harry Bunting of the Westchester County Police Department. In addition to introducing the dash cam video of the stop of defendant's vehicle, the defendant called two witnesses, Westchester County Police Officer Elena Cotto and Anthony D. Palacios, an expert witness in the field of standard field sobriety testing and DWI detection. Upon the close of testimony, this Court granted the parties' request to submit post hearing memorandums, and adjourned the matter until October 4, 2019 for decision.

Officer Carcaterra testified that on December 23, 2018 at approximately 1:33 a.m., while parked on the shoulder of the Cross County Parkway monitoring traffic, he

observed a Volkswagen being driven in an extremely erratic manner. Defendant's vehicle alternated between going well under the 45 mile per hour speed limit, at approximately 25 miles an hour, and to as fast as 85 miles per hour. He further observed numerous vehicles beeping and driving around it and slamming on their brakes as they approached defendant's vehicle. Based upon the driving he observed, Officer Carcaterra crossed over the grass median of the expressway to follow the vehicle, and after pulling up behind the defendant's vehicle, he observed that the defendant continued to alternately slow down and then speed up. He further testified that he continued to follow the vehicle to confirm his suspicion that the driver was possibly in need of some assistance, or intoxicated. After following defendant for approximately two miles he initiated his overhead emergency lights to stop the defendant's vehicle, which he said was failing to maintain a lane.

Officer Carcaterra testified that after pulling the defendant over at the Webster Avenue exit on the Hutchinson River Parkway and engaging her in conversation he suspected that she was intoxicated. His conclusion was based upon defendant having an odor of alcohol emanating from her breath, her eyes being bloodshot and watery and defendant's statement that she had an alcoholic drink sometime earlier that night. After calling Officer Cotto to the scene, the defendant was ordered out of her vehicle and asked to perform standardized field sobriety tests (SFST's). Officer Carcaterra testified that he demonstrated and then administered three field sobriety tests to the defendant; the horizontal gaze nystagmus test (hereinafter HGN test), the walk and turn test, and the one leg stand test.

The first SFST administered to Ms. Hillman was the HGN test. Officer Carcaterra claimed that Ms. Hillman demonstrated 6 clues on the HGN test. He further testified

that the defendant had lack of smooth pursuit in both eyes, her eyes were jerking at maximum deviation, and she had onset of nystagmus prior to 45 degrees.

The next two SFSTs administered to the defendant were the walk and turn and one leg stand. Officer Carcaterra testified that he was made aware by the defendant that she had a physical disability and needed a crutch to walk. Defendant told Officer Carcaterra she suffered from avascular necrosis. Defendant told him that one of her legs was shorter than the other, but that her disability would not affect her balance. He testified that he inquired of the defendant if she would be able to perform the tests to which she responded that she could, "[b]ut that the only thing is she might have a limp."

With respect to these two physical agility tests, Officer Carcaterra acknowledged that requiring a crutch to walk would hinder a person's performance on these two tests. Additionally, Officer Carcaterra could not say whether the defendant's failure to do the walk and turn and one leg stand correctly was due to her disability or intoxication.

Based upon his observations, Officer Carcaterra opined that defendant failed all three tests. Contrary to his opinion, Officer Cotto testified that she thought the defendant did okay on the field sobriety tests, and that defendant's speech was somewhat clear and her balance was steady enough to have passed one of the SFSTs. The Court notes that the defendant was not given an Alco-Sensor or breath screening test for the presence or absence of alcohol on her breath.

Concluding that defendant was intoxicated, Officer Carcaterra arrested defendant and transported her to the Westchester County Police headquarters. At the headquarters, a test of defendant's blood alcohol content by a DataMaster breathalyzer device produced a reading of .16 of one per centum by weight.

The defendant presented the testimony of Anthony D. Palacios, who was

accepted by the Court as an expert in the fields of Standard Field Sobriety Testing and National Highway Traffic Safety Administration standards, based on his biographical profile and curriculum vitae, as well as his testimony regarding his education, training, licensing, being qualified as an expert in many county, district and state courts, and role as a lecturer/trainer/consultant regarding SFSTs.

Unlike other field sobriety tests such as the walk-and-turn test and the one-leg stand, which simply test a person's motor coordination and ability to think and speak clearly, the HGN test deals with involuntary physiological movements of the eye and how such movements may be affected by the consumption of alcohol and/or drugs. It was the opinion of Mr. Palacios that the HGN test was done incorrectly by Officer Carcaterra. His conclusion, based on observing the dash cam video and reading the transcripts, was that the test was invalid and all clues were unreliable. Mr. Palacios explained that the required standardized distance and height for holding the stimulus during the HGN test is 12 to 15 inches away from a person's face and slightly above eye level. Mr. Palacios pointed out that the dash cam demonstrated that it was clear that Officer Carcaterra held the stimulus he was using well above Ms. Hillman's head to where it was not even close to slightly above eye level. Mr. Palacios explained that the consequence of putting a stimulus as far above eye level as Officer Carcaterra did in this case was that, according to NHTSA, it can cause a very high false positive rate.

In addition to the problems associated with placing the stimulus too high above eye level, Mr. Palacios testified to other errors in the timing rates used by Officer Carcaterra in the administration of the HGN test. Mr. Palacios testified that each step or each clue has a specific timing rate the officer is supposed to move the stimulus across the driver's line of sight. To evaluate lack of smooth pursuit, the officer is supposed to

move the stimulus in front of each of the driver's eyes two seconds from the center out to end point and then two seconds back to center. This process is then repeated for each eye. The entire test, therefore should take a total of sixteen seconds. Mr. Palacios testified that Officer Carcaterra completed the entire check in thirteen seconds, which, as explained by Mr. Palacios could induce a reaction that the officer can mistake for alcohol-induced nystagmus. Mr. Palacios next testified about the second portion of the HGN test, distinct and sustained nystagmus at maximum deviation. He stated that the officer moves the stimulus to a point past the driver's eye so that there is no longer white in the corner of the eye. Once there, they hold the eye in that position for a minimum of four seconds. During that entire time, the tester looks for the eyes to jerk. Mr. Palacios explained that the officer must hold it there for a minimum of four seconds because when the clue was developed and validated, scientists had found that when you move a person's eye out to maximum deviation, even when sober, the first couple seconds the person's eye muscle can jerk. If it's caused by alcohol, then the jerking will go on past four seconds and continue. Mr. Palacios testified that the two passes that Officer Carcaterra did on the defendant's left eye, which were pass number one and pass number three, were only held for one second, not the required four seconds out to maximum deviation. Additionally, he alleged that for the other two passes, Officer Carcaterra did not hold the eye out at maximum deviation at all.

In conclusion with respect to the HGN test, Mr. Palacios opined that all three portions of the HGN were conducted improperly, resulting in potential false positives and eliminating their validity as indicia of intoxication.

With respect to the physical agility tests, Mr. Palacios testified that the NHTSA training curriculum indicates that drivers with back, leg, or inner ear problems may have

difficulty with the tests even when sober. He further testified that an officer is not supposed to administer the walk and turn or one leg stand tests to individuals who have back, leg or inner ear problems because someone with a leg problem may be truly doing the best they can but they still may be displaying signs that officers are trained to look for and may be misinterpreted indicators of intoxication.

Based upon the evidence Mr. Palacios reviewed, including the dash cam footage, which captured how Ms. Hillman appeared, spoke and interacted, including her performance of the SFSTs, as well as his training and experience as a trainer, expert, and officer, he was not able to conclude that Ms. Hillman's ability to operate a motor vehicle was actually impaired by alcohol.

Where a defendant challenges the legality of a search and seizure, along with statements allegedly obtained as a result thereof, the People have the burden of going forward, in the first instance, to establish the legality of the police conduct (*People v Malinsky*, 15 NY2d 86 [1986]; *People v Wise*, 46 NY2d 321 [1978]). Once the prosecution has met its burden, the defendant has the ultimate burden of establishing the illegality of the police conduct, by a fair preponderance of the evidence (*People v Berrios*, 28 NY2d 361 [1971]; *People v DiStefano*, 38 NY2d 640 [1976]). Additionally, the People have the burden of proving the voluntariness of any statements allegedly made beyond a reasonable doubt (*People v Valeruis*, 31 NY2d 51 [1972]; *People v Anderson*, 42 NY2d [1977]).

The stopping of a moving vehicle, however brief, constitutes a seizure within the meaning of the Fourth Amendment. See, *People v Ocasio*, 85 NY2d 982 (1995); *People v May*, 81 NY2d 725 (1992); *People v Sobotker*, 43 NY2d 559 (1978). "[S]o long as some articulable basis exists for that interference, police stops of automobiles are

legal only pursuant to routine, nonpretextual traffic checks or when there exists at least a reasonable suspicion that the driver or the occupants of the vehicle have committed, are committing, or are about to commit a crime." *People v Spencer*, 84 NY2d 749, 753 (1995). "For a traffic stop to pass constitutional muster, the officer's action in stopping the vehicle must be justified at its inception and the seizure must be reasonably related in scope, including its length, to the circumstances which justified the detention in the first instance." *People v Banks*, 85 NY2d 558, 562 (1995), *cert denied* 516 U.S. 868 (1995); *see also*, *People v May*, 52 AD3d 147, 151 (1st Dept. 2008).

In order to establish the validity of the initial vehicle stop, the People relied solely upon the testimony of Officer Carcaterra, who testified that the defendant was driving erratically before and after he activated the dash cam video in his vehicle.

Officer Carcaterra's testimony of the defendant's erratic driving prior to his dash cam being activated was not contradicted, and will be accepted by this Court. However, the dash cam video diminishes the officer's credibility in significant respects. Viewing the dash cam video, this Court observed the Officer following the defendant's vehicle for approximately two miles, and despite Officer Carcaterra's testimony regarding defendant's erratic driving, the video appeared to show the defendant driving within the speed limit and within her lane at all times. At no time does it show the defendant driving slow and then speeding up, nor does it show defendant failing to maintain her lane in any significant manner.

An officer may arrest a person when the officer has probable cause to believe that the person has committed a crime (*see Dunaway v New York*, 442 US 200). "Probable 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 or that evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423 [1985]). "In determining probable cause, the standard to be applied is that 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" (*People v Vandover*, 20 NY3d 235, 237 [2012], quoting *People v Carrasquillo*, 54 NY2d 248, 254 [1981]). An arrest for driving while intoxicated is based on probable cause "if the arresting officer can demonstrate reasonable grounds to believe that the defendant had been driving in violation of Vehicle and Traffic Law § 1192" (*People v Kowalski*, 291 Ad2d 669, 670 [2002]).

Based upon the foregoing, this Court determines that the initial stop of the defendant's vehicle for a traffic infraction based upon the officer's observations was lawful. As such, as an initial matter, a defendant who has been temporarily detained pursuant to a routine traffic stop including suspected driving while intoxicated offenses, is not considered to be in custody for *Miranda* purposes (*People v Paris*, 26 AD3d 393 [2<sup>nd</sup> Dept], lv. den. 6 NY3d 851 [2006]). A reasonable initial interrogation during such stop is therefore held to be merely investigatory and does not require *Miranda* warnings (*People v Mackenzie*, 9 Misc3d 129[A] [App. Term, 9<sup>th</sup> and 10<sup>th</sup> Jud. Dists, 2005]). The Court accordingly determines that defendant's initial statements regarding her consumption of alcohol before being placed under arrest were voluntary beyond a reasonable doubt and admissible at trial.

Conversely, this Court also finds that the results of the field sobriety tests are inadmissible because the People have failed to prove that they had been administered in a manner consistent with the "Concepts and Principles of the Standardized Field



Sobriety Tests" manual promulgated by the National Highway Traffic Safety Administration (NHTSA). Therefore the Court cannot rely on the field sobriety tests, thereby stripping the test results of any probative value.

While the failure to establish that the tests had been properly administered does not in and of itself necessarily diminish the strength of the remaining proof of the existence of probable cause, the remaining proof failed to establish that defendant exhibited "actual impair[ment], to any extent, [of] the physical and mental abilities which [a person] is expected to possess in order to operate a vehicle as a reasonable and prudent driver" (*People v Cruz*, 48 NY2d 419, 427 [1979]). In this case the Court is left with the following facts to consider in determining whether the police had probable cause to arrest the defendant for driving while intoxicated. Officer Carcaterra's initial observation of the manner in which defendant drove her vehicle, odor of alcohol on the defendant's breath, bloodshot and watery eyes, combined with defendant's admission to the consumption of alcohol, albeit no evidence of recent consumption. In this action where the Court questions the credibility of the arresting officer, these factors are insufficient to support a finding of probable cause to effectuate the arrest of the defendant. Officer Carcaterra's observations raised a possibility that the defendant may have been intoxicated, but this Court cannot conclude that it is more probable than not that the defendant's condition was based on alcohol consumption to provide him with probable cause to arrest the defendant for driving while intoxicated. Thus, the People have failed to establish that the defendant's arrest was based on probable cause.

For the above reasons, since the People have not sustained their burden of establishing, from the totality of the circumstances, that it is more probable than not that the defendant was operating a motor vehicle while her physical or mental abilities were

actually impaired, to any extent, after consuming alcohol, all the evidence obtained subsequent to the arrest of Ms. Hillman should be suppressed on the ground that it was obtained as a result of an illegal arrest. Therefore, the defendant's statements after her arrest and the results of the chemical test is suppressed under the fruit of the poisonous tree doctrine. See *People v Hanson*, 5 Misc. 3d 67, 68 (App. Term, 9<sup>th</sup> & 10<sup>th</sup> Jud. Dist. 2004).

In light of the aforementioned ruling, the Court need not reach defendant's remaining contentions pertaining to any violation of her right to counsel and whether there was a properly administered observation period as required by 10 NYCRR 59.5 sufficient foundation was laid.

Dated: October 4, 2019  
Mount Vernon, New York

  
HON. ADRIAN N. ARMSTRONG  
City Judge of Mount Vernon

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