

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 92

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THE PEOPLE OF THE STATE OF NEW YORK **AFFIRMATION**

Plaintiff,

-against-

Indictment No. [REDACTED]

[REDACTED]
Defendant.

STATE OF NEW YORK)
 : ss.:
COUNTY OF [REDACTED])

[REDACTED] Esq., an attorney duly admitted to practice in the State of New York,
affirms under penalty of perjury as follows:

Background Facts

1. I am the attorney of record for [REDACTED] (the "Defendant").
2. I am fully familiar with the facts of this case and make this affirmation in support of Defendant's motion made herein.
3. Unless otherwise specified, all allegations of fact are based upon the inspection of the record of this case, conversations with Assistant District Attorneys, independent investigation, the discovery material provided in this case thus far, and/or upon other relevant materials.

**MOTION TO DISMISS OR REDUCE COUNTS OF THE INDICTMENT
BECAUSE THEY ARE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE**

4. The Defendant moves this Court, upon the Court's inspection of the Grand Jury minutes, for an order dismissing the indictment, or in the alternative, dismissing or reducing counts therein, pursuant to C.P.L. §210.20(1)(b), on the grounds that the evidence before the Grand Jury was not legally sufficient to establish the offenses charged or any lesser included offense, or in the

alternative, reducing those counts in the indictment to lesser included offenses pursuant to CPL §210.20[1-a], or in the alternative granting a hearing on the issues pursuant to CPL §210.45 (6).

5. Pursuant to C.P.L. 210.30(2) and (3), the Defendant moves for the transcription and inspection of the Grand Jury minutes in order to assist this Court in deciding the Defendant's motion herein for dismissal and/or reduction of the counts charged in the Indictment.

6. Such disclosure will allow counsel to effectively represent the Defendant on this motion to dismiss.

7. Should this Court not grant the Defendant's request for disclosure of the Grand Jury minutes, the Defendant respectfully requests that this Court conduct its own examination and based upon any and all grounds appropriate as determined by this Court upon an inspection of the Grand Jury minutes, and pursuant to C.P.L. Article 210 and the Defendant's rights under Amendments Five and Fourteen of the United States Constitution as well as the Defendant's right to Due Process under the Constitution of the State of New York; the Defendant moves for dismissal of each count charged in the Indictment; or in the alternative for the reduction of those charges; or a hearing on the issues pursuant to C.P.L. 210.45(6), on the grounds that the evidence before the Grand Jury was legally insufficient to support the charges brought. See C.P.L. 210.30.

8. Specifically the Defendant requests that the Court closely scrutinize the following:

A. Was the evidence before the Grand Jury legally insufficient to support the charges in the indictment or any lesser charge? People v. Pelchant, 62 N.Y.2d 97, 476 N.Y.S.2d 79 (1984); People v. Calbud, 49 N.Y.2d 589 (1980).

B. Was the evidence legally sufficient to establish that the Defendant operated a vehicle? The Criminal Court Complaint alleged that the Defendant was

seated in a parked vehicle with the engine running; while this may be sufficient for an arrest, the People must establish that the Defendant was seated in the vehicle "for the purpose of putting the vehicle in motion."

See CJI Pattern Jury Charge for VTL 1192(3).

C. Was the evidence legally sufficient to establish that the Defendant consumed alcohol to the extent that he was incapable, to a substantial extent, of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver? See People v. Ardila, 85 N.Y.2d 846 (1995); People v. Cruz, 48 N.Y.2d 419, 428 (1979).

D. Was the evidence legally sufficient to establish that the Defendant had prior convictions for a VTL 1192 offense within the preceding ten (10) years?

The court should be guided in this analysis by the holding of the Court of Appeals in People v. Van Buren, 82 N.Y.2d 878 (1993) which held that a certificate of conviction standing alone, without some further connecting evidence tending to show that Defendant was the same person named in the certificate was insufficient to establish every element of the offense charged before the Grand Jury.

E. Were the legal instructions given to the Grand Jury proper? People v. Malave, 476 N.Y.S.2d 422 (Sup.Ct., N.Y. Co. (1984);

F. Was each and every witness who testified before the Grand Jury in this case sworn and under oath? People v. Vasquez, 464 N.Y.S.2d 685 (Sup.Ct., N.Y. Co. (1984);

G. Was hearsay improperly admitted in the Grand Jury proceedings? People v. Alexander, 527 N.Y.S.2d 380 (1st Dept. (1988).;

H. Whether a proper quorum was present at all stages of the proceeding and that at least 16 jurors individually heard all the evidence presented to the panel and that at least twelve (12) members of the Grand Jury who heard all the critical and essential evidence as well as the charge voted to indict, C.P.L. 210.35(3);

I. Whether the District Attorney acted in a fair and impartial manner as the Grand Jury's legal advisor, and that the Grand Jury was not corrupted by the District Attorney as a prosecution directed against the Defendant. People v. Ianniello, 21 N.Y.2d 418 (1968); People v. DiFalco, 44 N.Y.2d 482 (1978).

9. The Defendant further requests disclosure of the legal instruction given to the Grand Jury. This will allow counsel to properly argue with regard to the accuracy and sufficiency of the prosecutor's instructions to the Grand Jury.

10. Insofar as the prosecutor, along with the court, constitutes the legal advisor to the Grand Jury, the prosecutor "must instruct the Grand Jury concerning the law with respect to its duties or any matter before it, and such instructions must be recorded in the minutes." C.P.L. 190.25(6). These instructions "are subject to review by the Court to determine whether there has been an impairment of the Grand Jury's function." People v. Colbert, 86 Misc.2d 729 (1979); see also People v. Goetz, 68 N.Y.2d 96 (1986); People v. Harse, 98 Misc.2d 188 (1979).

11. The legal instructions must charge the Grand Jury in an adequate manner, consistent with the issues and legal questions under consideration. See Matter of Report of Special

Grand Jury of Monroe County, 77 A.D.2d 199 (1981). The failure to instruct the Grand Jury properly, to the extent that such failure results in prejudice, requires dismissal of the indictment. People v. Kobjack, 39 Misc.2d 832 (1963); People v. Garcia, 103 Misc.2d 915 (1980); People v. Lawson, 84 Misc.2d 24 (1975).

12. The Defendant does not know the precise legal instructions that the prosecution provided to the Grand Jury. Nevertheless, the Defendant requests this Court examine whether the prosecution failed to provide tailored legal instructions contemporaneously with the legal issues and evidence that arose during the Defendant's case. Prosecutors sometimes fail to give continuing legal instructions to grand jurors. Instead, the prosecution opts to rely on the instructions that the impaneling court provided to the Grand Jury before the Grand Jury heard any evidence. These preliminary instructions only provide a boilerplate overview of the legal principles that the grand jurors, as lay persons, might need to apply. If this practice occurred in this case, the Grand Jury based its indictment of the Defendant on generalized instructions with no connection in time or place to the Defendant's particular case. The prosecutor thus failed to serve as legal advisor to the Grand Jury in a meaningful manner and on a continuing basis, People v. Bacote, N.Y.L.J. 4/26/89, p. 24, col. 4 (Sup. Ct., Kings Co.), rendering the indictment infirm.

HUNTLEY

MOTION SEEKING SUPPRESSION OF STATEMENTS

13. With respect to any and all statements *for which notice was served* under CPL § 710.30(1)(a), the Defendant moves to suppress any such statements on the grounds that such statements were obtained in violation of the Defendant's rights under the Fourth, Fifth, and Fourteenth Amendments to United States Constitution, and Article I, § 6 of the New York State

Constitution, and were also involuntarily made within the meaning of CPL § 60.45(2)(6)(I) and (II). CPL § 710.30.

14. Furthermore, as discussed in below, Defendant asserts that his initial arrest was unconstitutional and made without the requisite probable cause. As such, any statement thereafter elicited must be suppressed as the fruit of the initial illegality. See Wong Sun v. United States, 371 U.S. 471 (1963); Brown v. Illinois, 420 U.S. 590 (1975); Dunaway v. New York, 442 U.S. 200 (1979).

15. Consequently, the Defendant requests that all statements for which proper notice was given, be suppressed. People v. Huntley, 15 N.Y.2d 72 (1965), and that any testimony regarding all other statements for which proper notice was not given be precluded, as mandated by C.P.L. § 710.30(3).

REFUSAL/DUNAWAY

MOTION TO SUPPRESS TESTIMONY AND EVIDENCE OF A REFUSAL TO TAKE A CHEMICAL TEST AND OTHER RELATED TESTIMONY AND EVIDENCE

16. Upon information and belief the People may seek to allege at trial that the Defendant refused to submit to a breath test.

17. The Defendant now moves to suppress all evidence of a refusal to submit to a chemical test, including but not limited to the refusal report, refusal videos and any other police reports and all testimony concerning the alleged refusal. The Defendant also moves for an order suppressing any police observations of the Defendant and any evidence derived subsequent to his unlawful arrest.

18. The Defendant contends that any evidence of a refusal to take a breath test must be suppressed. The Defendant bases his contention on several grounds, including but not limited to the fact that:

A. The police officer did not have reasonable grounds to believe that the Defendant had been driving in violation of any subdivision of V.T.L. §1192, See Vehicle and Traffic Law §1194(2)(a)(1);

B. The arrest of the Defendant was unlawful;

C. The Defendant was not given sufficient warnings in clear and unequivocal language; See Vehicle and Traffic Law §1194(2)(f); here the Defendant was asked to submit to a chemical test and after reading the "appropriate warnings" thereafter, the officer gave a "layman's terms" explanation to the Defendant that subsequent warning made by the officer vitiated the validity of the printed warning initially administered to the Defendant. Gargano v. N.Y.S. Dept. of Motor Vehicles, 118 A.D.2d 859, 500 N.Y.S.2d 346;

D. The Defendant never gave a persistent refusal to submit to a chemical test; See Vehicle and Traffic Law §1194(2)(f);

E. The refusal did not occur within two hours of Defendant's arrest. People v. Morris, 8 Misc.3d 360, 793 N.Y.S.2d 754 (Crim. Ct. Richmond Co. 2005), People v. Brol, 81 AD2d 739 (4th Dept. 1981), see also People v. Atkins, 85 NY2d 1007 (1995);

F. The Defendant was denied the opportunity to speak with counsel.

19. If a hearing is ordered, the Defendant requests that all persons who were present at the time of the alleged refusal be present at the hearing so that they may be called as witnesses. In addition, Defendant asks that the District Attorney be ordered to produce all physical evidence relating to the alleged refusal, including but not limited to any and all videotapes.

20. In this case, the police officers involved in the Defendant's arrest did not have any basis upon which to form a reasonable, articulable suspicion that the Defendant had violated, was violating, or was about to violate any statute under the Penal Law or the Vehicle and Traffic Law of this State at the time he was detained by police.

21. It has been alleged by Police Officers that the Defendant was observed in the driver's seat with the engine running and the keys in the ignition. It is further alleged that the Defendant was intoxicated based on allegations that the Defendant had bloodshot watery eyes, slurred speech and an odor of alcoholic beverage on his breath. The Defendant denies being intoxicated or exhibiting the signs alleged by Police Officers, including but not limited to odor of alcohol, slurred speech and blood shot watery eyes.

22. The burden of "going forward" at a suppression hearing to show the propriety and legality of the police conduct rests upon the prosecution; see People v. Malinsky, 15 N.Y.2d 86, 262 N.Y.S.2d 65, 209 N.E.2d 694 (1965); People v. Berrios, 28 N.Y.2d 361, 321 N.Y.S.2d 884, 270 N.E.2d 709 (1971). It is the responsibility of the prosecution to first introduce evidence concerning the lawfulness of the search and seizure; see People v. Smith, 77 A.D.2d 544, 430 N.Y.S.2d 95 (1st Dep't 1980). The evidence presented by the prosecution to meet its burden must be plausible and credible; see People v. Oliver, 191 A.D.2d 815, 594 N.Y.S.2d 839 (3d Dep't 1993); People v. Void, 170 A.D.2d 239, 567 N.Y.S.2d 216 (1st Dep't 1991).

23. The Defendant was arrested unlawfully in violation of his constitutional rights derived from the United States Constitution Fourth, Fifth and Fourteenth Amendments; the New York State Constitutions, Article I, Subsection 12; Dunaway v. New York, 442 U.S. 200 (1979); Mapp v. Ohio, 367 U.S. 643 (1961); People v. Sobotker, 43 N.Y.2d 559 (1978); and People v. Ingle, 36 N.Y.2d 413 (1975).

24. "Observations made during unlawful intrusions fall within the ambit of the Fourth Amendment preclusion." People v. Akwa, 151 Misc.2d 106, 110-111 (Sup. Ct. Kings Co., 1991). See also People v. Dory, 59 N.Y.2d 121, 126-127 (1983). Therefore, Defendant now moves to suppress all testimony and evidence involving a refusal to submit to a breath test, police observations, and the videotape. See People v. Ayala, 89 NY2d 874, 653 N.Y.S.2d 92 (1996).

25. A limited amount of discovery has been supplied to the Defendant. Therefore, the Defendant is not in a position to provide information concerning the activities of the police in this case, other than what the Defendant personally observed.

26. Furthermore, the Court of Appeals has held that a defendant may not be denied a hearing on a motion to suppress because the accused lacks the information needed to make the correct allegations. Drawing an analogy to requests for Huntley and Wade hearings the Court stated: "It would be unreasonable to construe the CPL to require precise factual averments when, in parallel circumstances, defendant similarly does not have access to or awareness of the facts necessary to support suppression." People v. Mendoza, 82 N.Y.2d 45 (1993) (citations omitted).

27. In conclusion, Defendant now moves to suppress all testimony and evidence involving a refusal to submit to a breath test, police observations, and the videotape. See People v. Ayala, 89 NY2d 874, 653 N.Y.S.2d 92 (1996).

MOTION TO COMPEL

28. On or about September 26, 2012, the Defendant served upon the People a Request for a Bill of Particulars and a Demand for Discovery, a copy of which is attached herein as "Exhibit A".

29. To this date the People have not provided the Defendant with a Bill of Particulars.

30. The Defendant has been unduly prejudiced by this delay. The prompt review of a Bill of Particulars is critical in determining how best to further proceed with discovery such as subpoenas or investigation and this motion itself. As each day passes it makes it more difficult to fully investigate this matter.

31. The Defendant moves this court pursuant to C.P.L. §240.70, for an Order compelling the production a Bill of Particulars.

MOTION FOR C.P.L. §240.43 DISCLOSURE

32. The Defendant requests that the prosecutor notify him of all specific instances of the Defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for impeachment of the Defendant's credibility.

RESERVATIONS OF RIGHTS

33. The Defendant respectfully requests the right to make any and all further motions as may be necessary, based upon information and disclosure which may result from the granting of the request made herein, and/or information received from any record within a reasonable time. People v. Frigenti, 91 Misc.2d 139, CPL §255.20(3).

WHEREFORE, the affiant, upon the foregoing grounds respectfully requests this Court to grant the relief sought herein, and for such other and further relief as to this Court may seem just and proper.

Dated: [REDACTED]

[REDACTED] New York

By: [REDACTED]