

People v Phillips

2015 NY Slip Op 30340(U)

February 18, 2015

County Court, Wayne County

Docket Number: 14-64

Judge: Daniel G. Barrett

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This opinion is uncorrected and not selected for official publication.

At a Term of the County Court held in and for the County of Wayne at the Hall of Justice in the Village of Lyons, New York on the 5th day of January, 2015.

PRESENT: Honorable Daniel G. Barrett
County Court Judge

STATE OF NEW YORK
COUNTY COURT COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF NEW YORK,

-vs-

DECISION
Ind. No. 14-64

KENNETH J. PHILLIPS, JR.,

Defendant

Appearances - People - ADA Christopher Bokelman, Esq.
Defendant - Eileen D. Walsh, Esq.

The Defendant having moved for a pre-trial hearing. A hearing was scheduled on the issue of the stop, probable cause for arrest and admissibility of statements made by the Defendant to the troopers as set forth on the CPL 710.30 Notice. Both attorneys having provided the Court with submissions.

Trooper Connor testified that he stopped the Defendant's vehicle on May 18, 2014 towards the end of his shift. He was at the FasTrac Convenience Store/gas station on Whiskey Hill Road just north of the 104 intersection in the Town of Butler. Just south of the Fas Track store is a McDonald's. Both establishments share a common driveway or area from the public highway into their respective parking lots.

Trooper Connor was pumping gas when he testified that he was approached by a woman who told him that she saw a man urinating next to a red truck, who she believed

to be intoxicated in the McDonald's parking lot. The Trooper looked up and saw in the McDonald's parking lot three men gathered around a red pick up truck. Immediately thereafter a male truck driver came by and stated he saw a man in a green shirt urinating next to the red truck in the McDonald's parking lot and that the three men were throwing garbage out of the truck into the McDonald's parking lot. Immediately thereafter a man and woman came by and told the Trooper the same information as set forth above. However, the man and woman added that they thought the man in the green shirt was the driver of the truck.

The Trooper determined to investigate. After he finished gassing up he noticed the truck beginning to leave the McDonald's parking lot. He stopped the truck before it got to the roadway. He noticed that the windows were tinted and probably not legal. He obtained a driver's license from the Defendant. He put the tint meter up to the window of the driver's side and found that only 19% of light was allowed in and the standard is 70%. He eventually gave the driver a ticket pursuant to V&T 376(12)(A)(B)(2), excessive tint.

Trooper Connor testified that when he spoke to the driver of the vehicle he noticed immediately an alcoholic beverage coming from the Defendant and that the Defendant had watery/ bloodshot eyes. Approximately five minutes after stopping the Defendant Trooper Ellinwood appeared. Trooper Connor left the scene as his shift was ending.

Trooper Connor testified that the Defendant made a statement that he was at the Bog and Grog event in Sodus approximately twelve miles from McDonald's.

The Trooper also acknowledged that he did not know any of the people who came up to him at the FasTrac when he was pumping gas. He stated he was in the first row of pumps that are closest to the McDonald's parking lot.

He provided an arrest report and the first part is his narrative and the second part is Trooper Ellinwood's contribution.

Trooper Connor identified Defendant's Exhibit B which is a copy of a picture of the truck showing the truck to have larger tires than normal and having mud on it. Also admitted was Exhibit D which is a copy of the ticket issued to the Defendant by Trooper Connor.

Trooper Ellinwood testified that he arrived at the scene and was brought up to date by Trooper Connor. He addressed the Defendant and immediately smelled alcohol coming from his breath and testified his eyes were bloodshot and watery. When he engaged the Defendant in conversation the Defendant admitted he had been at the Bog and Grog in Sodus. Trooper Ellinwood suspected the Defendant was intoxicated and had him exit the truck to do standard field sobriety tests.

Trooper Ellinwood observed that when the Defendant exited the vehicle that he leaned on his door for support. He had the Defendant go to the rear of his truck. He firstly had him do the finger dexterity test, which is not a standard field sobriety test. He testified the Defendant did not touch the tip of his fingers as required and almost missed touching his fingers a couple of times.

He had the Defendant perform the HGN test. He explained the test. He testified there were six (6) clues indicating intoxication. His lack of smooth pursuit, the nystagmus at maximum deviation and the nystagmus prior to 45 degrees.

He then had the Defendant do the walk and turn test and testified that there were eight (8) clues indicating intoxication. He then had him do the one leg stand and testified there were four (4) clues indicating intoxication.

He read the Defendant the Miranda card as shown by Exhibit 1. He also gave the Defendant DWI Warnings. Defendant admitted to having one prior DWI.

The Defendant was placed under arrest and taken back to the barracks and further conversation was had wherein the Defendant stated he had twelve (12) beers throughout the day at the Bog and Grog.

On cross-examination he acknowledged he did not observe the Defendant operating the vehicle. That there were no audio or video recordings of any kind. That there were vehicles coming and going from the roadway and the parking lot at the McDonald's and the FasTrac. However he opined that he did not think that had anything to do with the Defendant's failure of the HGN test.

With regard to the walk and turn test the Defendant had work boots on. He testified specifically the Defendant stepped off the line, used his arms to balance, did not turn correctly and in some steps he did not go heel to toe. On the subject of the one leg stand the Trooper testified that the Defendant did not hold his leg out long enough.

The Defendant argues by his attorney that the Defendant's vehicle was stopped not according to law, based upon Trooper Connor's erroneous interpretation of the law and that anything that happened thereafter is a direct result of an unlawful stop and in violation of the New York State Constitution. That further the Defendant's vehicle was not operating on a public highway, road or street. That in addition any statements made by the Defendant to Trooper Connor must be precluded because the People failed to give notice as required by CPL 710.30.

The first issue is whether the vehicle was properly and/or able to be stopped. The Trooper testified that he received information from four different people regarding the acts of the Defendant and the occupants of his vehicle including that they might be intoxicated. The Trooper saw the vehicle moving and he stopped the vehicle, he observed that at least the windows on the driver's side had excessive tint and the driver was given a ticket. Certainly the Trooper had the ability to stop the vehicle on the issue of the excessive tint.

But also he was able to stop the vehicle due to the information he received from the four different people who came to him while he was pumping gas at the FasTrack. Case law has consistently held based upon certain information from civilians that police officers can stop vehicles based upon that information. A stop based upon a reasonable suspicion relying on hearsay reports must reveal reliable basis for the informant's knowledge and show that the informant is generally credible. In this case Trooper Connor had four different people approach him and all gave him very similar information. In addition, the Trooper was able to look over into the McDonald's parking lot, identify the Defendant and his occupants in the vehicle. The Trooper was able to make confirmatory observations. Due to the compiling of the information from the four people which was immediately one after the other and the information being consistent and similar, Trooper Connor had reasonable cause to stop the vehicle.

The next issue is whether the vehicle was stopped on a public highway. Again statutory and case law has settled this. The vehicle was stopped in a driveway or a public parking lot area that funnels traffic to and from both the Fastrac and McDonald's. It is a very busy public area and cars come and go on a regular basis.

Case law has repeatedly found that the public parking lot the Defendant traveled to and from is considered a public highway. There is no reason to list all the applicable case law. The Defendant's Memorandum lists cases that are not on point and/or are lower court cases. In addition, the legislature enacted VTL 1192(7) to end any speculation about a public highway, private roads and parking lots open to motor vehicle traffic. That section provides that a parking lot shall mean any area or areas of private property, including a driveway, near or contiguous to provide a connection with premises to use as a means of access to and egress from a public highway to such premises and having the capacity for the parking of four or more motor vehicles. Provisions of this section will not apply to any area or areas of private property comprising all or part of the property which is situated in one or two family residence.

Obviously in the instant case there was parking for more than four vehicles and there was no one or two family residence.

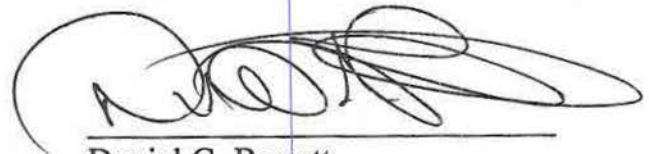
The next issue is probable cause for the arrest of the Defendant for Driving While Intoxicated. Trooper Connor testified as to observation of the Defendant concerning an alcoholic smell from his breath and blood shot and watery eyes. In addition, the Defendant admitted to driving the vehicle from the Bog and Grog in Sodus and admitted to having drank two beers. Trooper Ellinwood spoke to the Defendant and made the same observations as Trooper Connor. When the Defendant got out of the vehicle he had to lean against the driver door. Based upon this observation Trooper Ellinwood had the Defendant perform field sobriety tests which the Defendant then failed as testified to by Trooper Ellinwood. Defendant further made incriminating statements at the trooper station.

The Court finds there was probable cause for the arrest of the Defendant for Driving While Intoxicated.

Lastly there is an issue regarding the 710.30 Notice. There is a 710.30 Notice attaching the DWI Supporting Deposition and Bill of Particulars and attached to that is a 710.30 Notice as made out by Trooper Ellinwood. The statements as set forth in the 710.30 Notice made out by Trooper Ellinwood are at least preliminarily considered to be admissible at trial.

This constitutes the Decision of the Court.

Dated: February 18, 2015
Lyons, New York



Daniel G. Barrett
County Court Judge