Driving While Impaired by Drugs in 2022: What You Need to Know A Balanced Understanding from the Drug Recognition Expert and the Defense

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MCLE: 2.0 Professional Practice

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Joseph Gerstenzang is a partner at the law firm of Gerstenzang, Sills, Cohn & Gerstenzang. He is a 2011 *magna cum laude* graduate of Albany Law School, where he served as Senior Editor of the Albany Law Review.

After admission to the bar, Joseph immediately focused on handling DWI and DWAI Drugs cases. He is a faculty member of the National College for DUI Defense (NCDD). In addition, Joseph has lectured for the New York State Bar Association for years on a variety of topics, as well as for the New York State Defenders Association, the Ontario County Public Defenders, the New York State Magistrates Association (2018 annual conference), the National College for DUI Defense, the New York State Association of Criminal Defense Lawyers, and the Westchester County Bar Association. The topics are almost exclusively related to Driving While Intoxicated, Driving While Ability Impaired by Drugs and on how to approach Vehicle and Traffic Law matters in Town, Village and City Courts.

Trooper Joseph A. Turoski

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Trooper Joseph Turoski, previously a four in a half year veteran of the Town of Guilderland Police Department, was assigned to the Traffic Safety/ Stop DWI unit as an A-line officer working 11pm-7am. The Unit is responsible for aggressive enforcement of the vehicle and traffic law with a strong emphasis on the detection of criminal activity and impaired driving, hosting the county's victim's impact panel (VIP), datamaster maintenance, monthly reports to the county stop DWI program and the allocation of grant funding for traffic enforcement.

On October 24th 2016, Trooper Turoski attended the New York State Police Academy. A basic law enforcement school for Recruit Troopers. The Academy is 28 weeks including studies in penal law, vehicle and traffic law, defensive tactics, physical training, standardized field sobriety tests, breath test operator, RADAR and firearms. Trooper Turoski has been assigned to Troop F, Zones 2 and 3 and is currently assigned to Troop T Zone 2 at SP Albany.

During Trooper Turoski's career in law enforcement, he arrested 327 impaired or intoxicated drivers. While certified as a Drug Recognition Expert (DRE) Trooper Turoski has completed 130 drug influence evaluations since April, 2015. Trooper Turoski has been able to assist multiple outside agencies with drug influence evaluations: Albany PD, University at Albany PD, Bethlehem PD, Colonie PD, East Greenbush PD, Schenectady PD, Green Island PD, and Watervliet PD. As a result, in the arrests and evaluations, Trooper Turoski has had the opportunity to testify in different criminal courts. The courts include: Town of Guilderland Local Criminal Court (Albany County), Town of Wallkill Local Criminal Court (Orange County), Orange County Court, Albany County Court, Greene County Court and Schenectady County Court.

Most recently Trooper Turoski was chosen to attend the DRE Instructor School on April 29th 2019. Instructor candidates were selected through an application process and video presentations. During the probationary instructor phase Trooper Turoski was supervised by senior instructors and the state coordinator teaching Advanced Roadside Impaired Driving Enforcement (ARIDE) classes and at the May 2019 DRE school hosted in New Hartford, NY. Trooper Turoski became a certified DRE instructor as of June 6th, 2019.

Currently Trooper Turoski is temporarily assigned to the New York State Police Academy as an Academy Training Officer(ATO). Trooper Turoski is the lead instructor in the basic Standardized Field Sobriety Tests course and an instructor for basic traffic stops and "advanced" traffic stops to include drug identification and interdiction.

NYS MAGISTRATES ASSOCIATION 2022 CONFERENCE

DRIVING WHILE ABILITY IMPAIRED BY DRUGS IN 2022: WHAT YOU NEED TO KNOW. A BALANCED UNDERSTANDING FROM THE DRUG RECOGNITION EXPERT AND THE DEFENSE

SARATOGA SPRINGS, NEW YORK

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CASE LAW UPDATE

What Does it Mean to Be "Impaired" Within The Meaning of VTL § 1192(4)?

There is no statutory definition of "impaired" in the VTL. However, in **People v. Cruz**, 48 N.Y.2d 419, 423 N.Y.S.2d 625 (1979), the Court of Appeals defined what it means to be "impaired" by alcohol:

> [T]he question in each case is whether, by voluntarily consuming alcohol, this particular defendant has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

By contrast, Cruz defined what it means to be "intoxicated" by alcohol as follows:

> In sum, intoxication is a greater degree of impairment which is reached when the driver has voluntarily consumed alcohol to the extent that he is incapable 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.

People v. Rossi
163 A.D.2d 660, 558 N.Y.S.2d 698
(3d Dep't 1990)

> Although People v. Scallero involved a violation of [VTL] former § 1192(1) relating to alcohol, the same language, and thus standard, was found in [VTL] former § 1192(4) relating to drugs.

(Citation omitted). See also **People v. Bayer**, 132 A.D.2d 920, 518 N.Y.S.2d 475 (4th Dep't 1987) ("while a violation of either subdivision (3) or (4) of [VTL] § 1192 is a misdemeanor, the elements of the [2] crimes differ. Proof that defendant was in an intoxicated condition is essential to a prosecution under subdivision (3), but is not required under subdivision (4)").

People v. Caden N.
189 A.D.3d 84, 133 N.Y.S.3d 107
(3d Dep't 2020)

The term "impairment" as used in [PL] § 125.12(1) is not statutorily defined. The Court of Appeals has defined that term in the limited context of the prohibition against driving while one's ability to do so is impaired by alcohol. In that situation, the question of impairment focuses on "whether, by voluntarily consuming alcohol, [the] defendant has actually impaired, *to any extent*, the physical and mental abilities which he [or she] is expected to possess in order to operate a vehicle as a reasonable and prudent driver." However, as noted by the Court of Appeals, driving while intoxicated by alcohol is a more serious offense (a misdemeanor) than driving while impaired by alcohol (a traffic infraction) and, therefore, requires a showing of "a greater degree of impairment," focusing on whether "the driver has voluntarily consumed alcohol to the extent that he [or she] is *incapable* of employing the physical and mental abilities which he [or she] is expected to possess in order to operate a vehicle as a reasonable and prudent driver." Although the parties both rely on the Court of Appeals' definition of "impairment by alcohol" as set forth in Cruz to supply the relevant definition of "impairment by the use of a drug" as used in [PL] § 125.12, we conclude that this definition is misplaced in the context of assessing whether a person has committed the crime of [Vehicular Manslaughter 2nd]. The focus of these provisions is on whether a driver's ability to operate a motor vehicle has been compromised by the consumption of alcohol or drugs and to what extent. In effect, the greater a driver's ability to function has been compromised the greater the penalty imposed. For this reason, "the scheme of [VTL §] 1192 provides for different levels or kinds of proof to establish violations of the statute."

> Notably, under [PL] § 125.12(1), one who operates a motor vehicle and causes the death of another while impaired by alcohol is not subject to a conviction for [Vehicular Manslaughter 2nd], whereas one who causes such death while intoxicated by alcohol or impaired by a drug (or a combination of alcohol and drugs) falls within the statute's reach. This statutory scheme imposes equal sanctions upon motorists who cause death while intoxicated by alcohol or while impaired by a drug. Such a distinction between impairment by alcohol and impairment by a drug (or a combination of both) can only be deemed consistent with the legislative scheme if the same standard is applied to each misdemeanor category included in the vehicular manslaughter statute. Accordingly, in our view, the degree of impairment necessary to convict a motorist of [Vehicular Manslaughter 2nd] based upon a death that was caused while such motorist was under the influence of [1] of the drugs enumerated in [PHL] § 3306 (which includes marihuana) is the same degree of impairment as would be necessary to sustain a conviction of driving while intoxicated by alcohol -- namely, the People must prove that such motorist was "*incapable* of employing the physical and mental abilities which he [or she] was[] expected to possess in order to operate a vehicle as a reasonable and prudent driver." To the extent that this Court's decision in People v. Rossi can be read as holding that a conviction of [Vehicular Manslaughter 2nd] based upon a violation of [VTL] § 1192(4) only requires proof that the motorist was impaired "to any extent," it should no longer be followed.

(Citations omitted).

Notably, Caden N. did not address the issue of whether Rossi still applies to VTL § 1192(4) cases that do not involve a vehicular crime.

Quantifying Drug Impairment

People v. Caden N.
189 A.D.3d 84, 133 N.Y.S.3d 107
(3d Dep't 2020)

Following a Frye hearing, County Court "limited testimony from any witness about '[a] correlation between blood levels of THC which may have been taken at the [emergency room] and [the defendant's] impairment at the time of the crash.'"

> Although not challenging County Court's Frye ruling, defendant . . . contends that the court violated its Frye ruling and abused its discretion in admitting certain opinion testimony from Spratt on the issue of defendant's alleged impairment. * * *
>
> Defendant contends that County Court erred by allowing Spratt to utilize his performance on the FSTs as a component of her opinion that defendant was impaired at the time of the accident when [police officers] Murray and Salyerds were precluded from opining as to his impairment due to their failure to administer the full Drug Recognition Evaluation protocol. Spratt, however, was a board-certified forensic toxicologist who possessed specialized knowledge about the manner in which marihuana affects psychomotor capabilities and was qualified to give an opinion on the matter. . . . Moreover, contrary to defendant's contention, Spratt did not base her opinion that he was impaired at the time of the accident on the specific level of THC found in his blood and expressly acknowledged that "you can't back extrapolate . . . with marihuana." . . . Her opinion was informed by a variety of factors, including the timing of the accident in relation to when the peak effects of marihuana typically occur, the circumstances of the accident, defendant's "outward signs" of impairment and the fact that active THC was found in his blood thereafter. As Spratt was qualified to render such an opinion and her testimony was within the permissible bounds of County Court's Frye ruling, County Court did not abuse its discretion in admitting her testimony.

Evidence of 911 Call Required at Probable Cause Hearing

People v. Walls
37 N.Y.3d 987, 152 N.Y.S.3d 112
(2021)

> However, the People failed to introduce the 911 recording, failed to introduce any evidence indicating whether the 911 caller was an identified citizen informant or an anonymous tipster, and failed to offer any explanation of the basis of the caller's knowledge. In sum, the People put forward no relevant information concerning the circumstances surrounding the call at the hearing. Contrary to the People's suggestion that an appellate court can consider evidence subsequently admitted at trial to justify affirmance of an order denying suppression, "the propriety of the denial must be judged on the evidence before the suppression court." Therefore, on the record of the suppression hearing, "whether evaluated in light of the totality of the circumstances or under the Aguilar-Spinelli framework, the reliability of the tip was not established." Accordingly, the People's evidence was insufficient to justify the stop and, absent evidence of the weapon, the indictment should be dismissed.

(Citations omitted).

Causation in Vehicular Crimes Case

People v. Caden N.
189 A.D.3d 84, 133 N.Y.S.3d 107
(3d Dep't 2020)

> With respect to causation, the People were required to prove that defendant "set in motion the events that led to the victims' deaths" and "was a sufficiently direct cause of the ensuing deaths." * * *
>
> Defendant . . . contends that the presumption set forth in [PL] §§ 125.13 and 125.12 is unconstitutional as applied in cases of marihuana impairment because it shifts the burden of proof on the element of causation and is unconstitutionally vague. . . . In People v. Stickler, this Court concluded that the presumption set forth in [PL] § 125.12 -- which is substantially the same as the one set forth in [PL] § 125.13 -- does not shift the burden of proof on the element of causation, explaining the presumption is permissive and arises only if the People first prove, beyond a reasonable doubt, that the person operating a motor vehicle caused the victim's death while unlawfully intoxicated by alcohol or impaired by a drug. . . . Although Stickler was decided in the context of an accident that occurred when the defendant was intoxicated by alcohol, we perceive no reason to depart from its holding in the case of impairment by marihuana. * * *
>
> This Court's pronouncement in People v. Stickler that the rebuttable presumption does not arise if "a driver's operation of a vehicle cannot be deemed *the* cause of the subject accident" is a misstatement of law and should not be followed.

(Citations omitted).

Relevance of Victim's Impairment in Vehicular Crimes Case

People v. Caden N.
189 A.D.3d 84, 133 N.Y.S.3d 107
(3d Dep't 2020)

> Defendant . . . contends that County Court abused its discretion in excluding certain testimony about the motorcycle driver's positive blood test for THC. At the outset, we note that the trial evidence included an exhibit of the motorcycle driver's postmortem toxicology report, which showed a positive THC level of 0.73 ng/ml. County Court, therefore, had evidence before it regarding the fact that THC was found in the motorcycle driver's blood. It merely precluded additional trial testimony on the matter. To the extent that such testimony may have been relevant to the issue of the motorcycle driver's impairment at the time of the collision, such impairment, even if it could be established, would not have constituted a superseding cause sufficient to absolve defendant of criminal liability under these circumstances, given the proof that the manner in which he turned in front of the motorcycle would not have given even a nonimpaired person sufficient time to react. Therefore, we cannot conclude that County Court committed reversible error in excluding such testimony.

(Citation omitted).

IID Inapplicable to Conviction of DWAI Drugs

People v. Miller
191 A.D.3d 802, 141 N.Y.S.3d 490
(2d Dep't 2021)

> As the People correctly concede, the County Court improperly imposed an [IID] requirement upon the defendant. The defendant pleaded guilty to aggravated [DWI] in violation of [VTL] § 1192(2-a)(b) for "[d]riving while ability impaired by drugs." A court may impose an [IID] as a condition of probation and conditional discharge only for offenses involving alcohol (see [PL] § 65.10[2][k-1]). The defendant's conviction here falls outside the scope of the statute authorizing the imposition of such a condition. Accordingly, we modify the judgment by vacating so much of the sentence as directed the defendant to install an [IID] on any vehicle he owns or operates for a period of [3] years.

(Citations omitted). See also **People v. Levy**, 91 A.D.3d 793, 938 N.Y.S.2d 315 (2d Dep't 2012) ("We agree with the defendant that the County Court improperly directed, as a condition of probation, that the defendant install an [IID] on her motor vehicle. . . . Here, the defendant's conviction for [DWAI Drugs] pursuant to [VTL] § 1192(4) falls outside the scope of [PL] § 65.10(2)(k-1)").

IID Inapplicable to Conviction of DWAI

People v. Redmond
2021 WL 2908756
(App. Term, 2d, 11th & 13th Jud. Dist. 2021)

> On appeal, defendant argues, among other things, that the Criminal Court lacked the authority to resentence him to a conditional discharge requiring him to install and maintain an IID, as he was only convicted of [DWAI].
>
> [PL] § 65.10(2)(k-1) provides that a court may impose a condition to install and maintain a functioning IID only where the defendant "has been convicted of a violation of [VTL § 1192(2), (2-a) or (3)], or any crime defined by the [VTL or the PL] of which an alcohol-related violation of any provision of [VTL § 1192] is an essential element." Here, defendant's conviction of [DWAI] pursuant to [VTL] § 1192(1), a traffic infraction, falls outside the scope of [PL] § 65.10(2)(k-1). Consequently, the imposition of a conditional discharge requiring defendant to install and maintain an IID for [1] year is not authorized and must be stricken.

(Citations omitted).

Plea Bargain Limitations

VTL § 1192(10)(a)(i) provides that:

> In any case wherein the charge laid before the court alleges a violation of [VTL § 1192(2), (3), (4) or (4-a)], any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of the provisions of [1] of the subdivisions of [VTL § 1192], other than [VTL § 1192(5) or (6)], and no other disposition by plea of guilty to any other charge in satisfaction of such charge shall be authorized; provided, however, if the district attorney, upon reviewing the available evidence, determines that the charge of a violation of [VTL § 1192] is not warranted, such district attorney may consent, and the court may allow a disposition by plea of guilty to another charge in satisfaction of such charge; provided, however, in all such cases, the court shall set forth upon the record the basis for such disposition.

People v. Tagiev
70 Misc. 3d 47, 137 N.Y.S.3d 242
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

Defendant -- who was charged with, *inter alia*, DWAI Drugs -- pled guilty to common law DWI in satisfaction of the charges. Defendant thereafter appealed, claiming that his plea was invalid because (a) since common law DWI has an IID requirement but DWAI Drugs does not, common law DWI is a higher grade offense than DWAI Drugs, and (b) since he was not accused of consuming alcohol, he could not validly allocute to common law DWI. The Appellate Term rejected these claims, holding that defendant's plea was authorized by both VTL § 1192(10)(a)(i) and case law.

See also **People v. Abreu-Lugo**, 2021 WL 219641 (App. Term, 2d, 11th & 13th Jud. Dist. 2021) (same result where defendant pled guilty to AUO 2nd in satisfaction of DWI, DWAI, AUO 3rd and Unlicensed Operation charges).

People v. Brown
2021 WL 2126086
(App. Term, 2d, 11th & 13th Jud. Dist. 2021)

> [D]efendant was charged with failing to signal a lane change, [DWAI], driving a motor vehicle without displaying illuminated numbers on the rear license plate, common-law [DWI], [AUO 3rd], and unlicensed operation of a motor vehicle. . . . [F]ollowing his conviction on charges in an unrelated case, the People made a plea offer to defendant "to the count of VTL 511(1)(a), a $200 fine, successful completion of the Driver Improvement Program and a conditional discharge," which offer defendant accepted after consulting with his attorney. The Criminal Court then advised defendant of the rights he was waiving, and he was sentenced as promised.
>
> On appeal, defendant contends that his plea should be vacated because the Criminal Court did not have jurisdiction to accept the plea because it had failed to "set forth upon the record the basis for such disposition," as required by [VTL] § 1192(10); that his plea was not entered into knowingly and voluntarily; and that his sentence is excessive and should be reduced. * * *
>
> As the Criminal Court did not "set forth upon the record the basis for [its] disposition," we find that defendant's plea was improperly entered. We note that to hold otherwise would effectively nullify the effect of [VTL] § 1192(10), in its entirety.
>
> Accordingly, the judgment of conviction is reversed, the plea is vacated and the matter is remitted to the Criminal Court for all further proceedings.

(Citations omitted).

Certificate of Compliance Issues

People v. Knorr
___ Misc. 3d ___, ___ N.Y.S.3d ___, 2021 WL 3629140
(Henrietta Just. Ct. 2021)

> The Defendant moves for an order invalidating the People's certificate of compliance and statement of readiness for trial ("COC") and dismissing the People's misdemeanor accusatory instrument on the grounds that she has been denied a speedy trial by virtue of incomplete and untimely discovery. The motion is granted. The certificate of COC is declared invalid and the misdemeanor accusatory instrument is dismissed. * * *
>
> [T]he Defendant emailed a request to the People for the Drug Recognition Expert's Full Rolling Log (the "Log"), noting that a previous request for the Log to the Assistant District Attorney formerly handling the file had gone unanswered. Only Log entry No. 96 concerning the Defendant's toxicology evaluation was provided on December 21, 2020. * * *
>
> In this matter, the People did not claim that the Log was not discoverable, that it was inadvertently omitted, or delayed by oversight. They could not explain why the Log was not obtained, nor enumerate any steps that had been taken to secure it. There is no indication that the supplemental COC's characterization of the partial log as "rolling logs of Dep Corona" was a deliberate attempt to obscure the fact that but a single entry log had been produced. More likely it was carelessness that resulted in a failure to ascertain the completeness of the log prior to production. Whether deliberate or careless, the People's lack of effort demonstrates a lack of good faith.

Sufficiency of Accusatory Instrument

People v. Slade
37 N.Y.3d 127, 148 N.Y.S.3d 413 (2021)

In these [3] appeals, defendants challenge the facial sufficiency of the accusatory instrument filed against them, arguing that participation of a translator in the process of documenting the information from first-party witnesses with limited-English proficiency created a hearsay defect requiring dismissal of the instrument. In the first [2] cases, applying our well-settled precedent, we hold that no facial defect was evident within the [4] corners of the accusatory instrument. Moreover, even in the third case where the participation of a translator was documented within the witness's supporting affidavit, we conclude that no additional layer of hearsay was created by the use of a translator and therefore that accusatory instrument too was facially sufficient. * * *

[T]he CPL does not require a certificate of translation, let alone a certificate in any particular form, to create a facially sufficient instrument. The Uniform Rules for Trial Courts generally direct courts exercising criminal jurisdiction to "comply[] with the applicable provisions of CPLR 2101." However, the specific rules applicable to facial sufficiency of misdemeanor informations are found in the CPL and the governing provisions do not require a certificate of translation or the affidavit of a translator. CPLR 2101(b) cannot be used to override those specific requirements.

We conclude that, when evaluating the facial sufficiency of an accusatory instrument, no hearsay defect exists where, as here, the [4] corners of the instrument indicate only that an accurate, verbatim translation occurred, and the witness or complainant adopted the statement as their own by signing the instrument after the translation.

(Citations omitted).

Amendability of Accusatory Instrument

People v. Hardy
35 N.Y.3d 466, 132 N.Y.S.3d 394
(2020)

> The issue before us is whether the lower courts erred in permitting amendment of a clearly erroneous fact contained in the information charging Mr. Hardy with harassment and contempt in the second degree. In People v. Easton, we upheld a similar amendment. However, Easton was decided when the Code of Criminal Procedure governed criminal prosecutions. Following several years of study and numerous reports by the Bartlett Commission, the legislature replaced the Code of Criminal Procedure with the modern Criminal Procedural Law (CPL). Relying on Easton, the Appellate Term held that the factual amendment of the clearly erroneous date was permissible. We must now decide whether Easton remains good law following the passage of the Criminal Procedure Law. We conclude the CPL displaced Easton and precluded prosecutors from curing factual errors or deficiencies in informations and misdemeanor complaints via amendment. The CPL requires a superseding accusatory instrument supported by a sworn statement containing the correct factual allegations. Therefore, we reverse. * * *
>
> For complaints and informations, the legislature did not permit factual amendments for time, place, or names, as it had for prosecutor's and superior court informations. Instead, CPL 100.45(3) permits the prosecutor to amend only the accusatory part of an information to add additional charges, provided those charges are supported by the original factual allegations. * * *
>
> Allowing amendments to the factual part of an information would render the restriction in CPL 100.45 meaningless.

(Citation and footnote omitted).

Reprosecution of Traffic Ticket Following Dismissal For Failure to Provide Supporting Deposition

People v. Epakchi
37 N.Y.3d 39, 146 N.Y.S.3d 561
(2021)

> The Appellate Term for the Ninth and Tenth Judicial Districts has adopted a rule of criminal procedure under which, absent special circumstances, the People cannot reprosecute a defendant by filing a new simplified traffic information after the original simplified traffic information was dismissed for facial insufficiency under CPL 100.40(2) for failure to provide a requested supporting deposition in a timely manner. Because that rule has no basis in the [CPL] and contravenes our holding in People v. Nuccio, we reverse. * * *
>
> In sum, the Appellate Term lacks authority to create a procedural rule, requiring special circumstances for the renewed prosecution of a traffic offense after a previous dismissal for failure to provide a requested supporting deposition, that is inconsistent with Nuccio and the courts' authority under the [CPL].

(Citation omitted).

Type of Accusatory Instrument Required When Refiling Following Dismissal for Failure to Provide Supporting Deposition

People v. Epakchi
37 N.Y.3d 39, 146 N.Y.S.3d 561
(2021)

> Nuccio governs where, as here, a simplified traffic information is dismissed for facial insufficiency. . . . Defendant's attempt to distinguish the newly filed accusatory instrument in Nuccio (a "long-form" information) from the newly filed accusatory instrument at issue here (a simplified traffic information accompanied by a supporting deposition with sufficient factual allegations) is unavailing. Nuccio did not hinge its analysis on the nature of the subsequently filed instrument. . . . As in Nuccio, the original accusatory instrument here was a local-court accusatory instrument subject to dismissal as facially insufficient because the People failed to timely provide the supporting deposition requested by defendant. The [CPL] does not prohibit reprosecution upon a facially sufficient accusatory instrument after such a dismissal, whether by information or by simplified traffic information with a supporting deposition.

(Footnote omitted).

STI Accompanied by Non-Hearsay Supporting Deposition Is Equivalent to Long-Form Information

People v. Epakchi
37 N.Y.3d 39, 146 N.Y.S.3d 561
(2021)

> A "long-form" information is not one of the accusatory instruments defined in the [CPL]. This qualifier is a shorthand to distinguish informations that contain legally sufficient sworn factual allegations in support of the charges from simplified informations, which do not. To be facially sufficient, an information -- supplemented, as the case may be, by a supporting deposition -- must contain nonhearsay allegations in support of the charges. On the other hand, where a defendant has timely requested a supporting deposition, a simplified information is facially sufficient only if the supporting deposition is provided within the time prescribed by law. As observed by the motion court, the accusatory instrument used in the subsequent filing here -- a simplified traffic information accompanied by a nonhearsay supporting deposition -- was equivalent to a long-form information.

(Citations omitted).

Probable Cause to Stop -- Generally

People v. Hinshaw
35 N.Y.3d 427, 132 N.Y.S.3d 90
(2020)

Because the state trooper lacked an objectively reasonable suspicion that a crime had occurred or probable cause to stop Mr. Hinshaw's vehicle for a traffic infraction, we conclude the automobile stop was unlawful.

On the afternoon of November 8, 2014, a New York State Trooper stopped a vehicle on a street in Buffalo. The trooper had observed no traffic violations and saw that the inspection sticker was valid, both of the occupants were wearing their seatbelts, and "everything looked good." Nevertheless, the trooper ran a check of the car based on the front license plate. The inquiry produced a response that began with a direction to "CONFIRM RECORD WITH ORIGINATOR," listed as the Buffalo City Police Department. The response then instructed:

"**THE FOLLOWING HAS BEEN REPORTED AS AN IMPOUNDED VEHICLE ---- IT SHOULD NOT BE TREATED AS A STOLEN VEHICLE HIT ---- NO FURTHER ACTION SHOULD BE TAKEN BASED SOLELY UPON THIS IMPOUNDED RESPONSE**" * * *

We merely recognize what Robinson did impliedly and the Appellate Division departments, as a consequence, have done expressly: erased any dicta in Ingle that have sometimes been read to permit stops for traffic infractions based on less than probable cause. To the extent there exists any inconsistency between Robinson and Ingle, any uncertainty by commentators, or any "confusion among the courts," stopping a vehicle for a traffic infraction requires probable cause; stopping a vehicle for suspicion of criminal activity requires less: "reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime."

(Citations omitted).

People v. Balkman
35 N.Y.3d 556, 134 N.Y.S.3d 321
(2020)

A police officer stopped a vehicle because his patrol car's mobile data terminal (MDT) notified him that there was a "similarity hit," indicating that something was similar about the registered owner of the vehicle and a person with an outstanding warrant. After observing a chrome handgun on the floor of the front passenger seat where defendant was sitting, the officer arrested defendant, who was neither the registered owner of the vehicle nor the person with the warrant. Defendant moved to suppress the evidence obtained from the stop. Because the People failed to meet their burden to come forward with evidence sufficient to establish that the stop was lawful, that motion should have been granted. * * *

The People presented no evidence about the content of the "similarity hit" -- neither what particular data of the registered owner of the vehicle and the person with the warrant matched, nor what kinds of data matches, in general, result in "similarity hits." Without such evidence, the suppression court could not independently evaluate whether the officer had reasonable suspicion to make the stop.

Probable Cause to Stop -- Brake Light Out

People v. Reano
2020 WL 7484908
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

> At a suppression hearing, Police Officer Volcy testified that, at 12:46 a.m., he observed a white BMW stopped at a bus stop. When he approached the vehicle, he saw defendant in the driver's seat. . . . The officer told defendant that he had to move his vehicle because he could not be parked in a bus stop. . . . As the officer walked to the back of the vehicle, defendant drove off. He noticed that defendant's left rear brake light was not operational. He got back into his police vehicle and pulled defendant over. * * *
>
> Following the hearing, the Criminal Court granted defendant's motion to suppress the evidence, finding that the stop was illegal as defendant's vehicle was equipped with at least two working brake lights. * * *
>
> We find that the officer had reasonable cause to believe that defendant had violated [VTL] § 375(2)(a)(3), since the brake light located on the left rear side of the vehicle was not functioning.
>
> Accordingly, . . . defendant's motion to suppress evidence is denied and the matter is remitted to the Criminal Court for all further proceedings.

(Citations omitted). See also **People v. Pena**, 36 N.Y.3d 978, 139 N.Y.S.3d 70 (2020) (Feinman, J., concurring) ("The [VTL] required the center stop lamp on defendant's 2003 Dodge Caravan to be functioning. Therefore, as defendant's center stop lamp was not functioning, the officer, having probable cause to believe that the driver was committing a traffic violation, made no mistake of law in stopping his vehicle"); id. (separate concurring opinion) ("Even assuming the officer was in fact mistaken on the law, it was nevertheless objectively reasonable to conclude that defendant's non-functioning center brake light violated the [VTL]. Because any error of law by the officer

was reasonable, there was probable cause justifying the stop") (footnote omitted).

Probable Cause to Stop -- License Plate Bracket

People v. Jones
190 A.D.3d 1013, 139 N.Y.S.3d 421
(3d Dep't 2021)

> On January 6, 2017, State Trooper Clayton Howell was on patrol duty on the New York State Thruway when he received an alert to be on the lookout for a gray Kia bearing a certain license number. Thereafter, Howell observed the vehicle and began following it when he noticed its rear license plate was partially obscured by the license plate bracket. Believing this obstruction to be a violation of the [VTL], Howell initiated a traffic stop. * * *
>
> Howell testified that while he was driving behind the vehicle, he observed that the rear license plate was partially covered by a license plate bracket in violation of [VTL] § 402(1). He further testified that the bracket covered about an inch to an inch and a half of the bottom portion of the license plate, covering the words "Empire State" and the area where inspection stickers or commercial vehicle information would be. Howell's uncontradicted testimony that he observed defendant driving with a license plate partially obstructed provided probable cause for his subsequent stop of the vehicle, which was lawful.
>
> Defendant's contention that no violation occurred because Howell was able to read the numbers on the license plate is meritless. . . . The statutory language repeatedly refers to number plates, reflecting a clear intent that no part of the plate may be obstructed, and not merely that the numbers be unobstructed. Had the Legislature intended only to prohibit the obstruction of the numbers on the plates, it could have done so.

(Citations omitted). See also **People v. Pealer**, 20 N.Y.3d 447, 457 n.2, 962 N.Y.S.2d 592, 598 n.2 (2013) ("contrary to the

dissent's suggestion, there is no exception for infractions that are subjectively characterized as 'de minimis'").

Probable Cause to Stop -- Missing Inspection Sticker

People v. Trine
188 A.D.3d 1624, 132 N.Y.S.3d 372
(4th Dep't 2020)

> The evidence at the suppression hearing established that a New York State Trooper stopped the vehicle defendant was driving after observing that the vehicle did not have an inspection sticker affixed to the lower left corner of its windshield. During the stop, defendant acknowledged that his vehicle had recently failed its inspection and produced a document extending the prior inspection period by 10 days. The Trooper testified that he did not see this document on defendant's windshield at the time he initiated the traffic stop. Indeed, the evidence at the hearing established that the document was not affixed to the windshield, but had been placed on the dashboard behind the registration sticker.
>
> A police officer may lawfully stop a motor vehicle where he or she has probable cause to believe that the driver of the car has committed a traffic violation. . . . Here, the uncontroverted evidence established that, at the time the Trooper initiated the traffic stop, he observed no inspection documentation displayed in the vehicle's windshield, and therefore the stop was justified. Although defendant subsequently produced a document showing that he had received an extension on his inspection certification, that document was not displayed at the time the Trooper initiated the stop because it was not visible through the windshield but rather was concealed by the registration sticker.

(Citations omitted).

Depraved Indifference

People v. Edwards

36 N.Y.3d 946, 136 N.Y.S.3d 219 (2020)

> The evidence presented to the Grand Jury was legally sufficient to demonstrate that defendant acted with depraved indifference to human life. * * *
>
> There was evidence before the Grand Jury that, in order to evade the police, defendant, who was legally intoxicated, fled down a local road with [2] passengers at a speed of at least 119 miles per hour -- more than [3] times the speed limit. Defendant then abruptly swerved across the lanes of oncoming traffic into a parking lot and crashed into a wall. Viewing the evidence in the light most favorable to the People, the Grand Jury could rationally have found that defendant "recklessly engaged in conduct that created a grave risk of death to [his passengers], with an utter disregard for whether any harm came to th[em]." "That other, innocent inferences could possibly be drawn from [the evidence presented to the Grand Jury] is irrelevant to the sufficiency inquiry" where, as here, "'the Grand Jury could rationally have drawn the guilty inference.'"

(Citations omitted).

Sealing Issues

People v. Anonymous

34 N.Y.3d 631, 123 N.Y.S.3d 41
(2020)

With certain exceptions:

> The sealing mandate of CPL 160.50(1), in combination with CPL 160.60 -- which provides that "the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status [the accused] occupied before the arrest and prosecution" -- requires more than a court's acknowledgment that the arrest and prosecution ended favorably. The law clearly intends that the criminal action and proceedings be treated as if they never occurred -- as if they are not part of defendant's past.

Sealing of DWI Pursuant to CPL § 160.59

People v. Cadet
2021 WL 2559590
(App. Term, 9th & 10th Jud. Dist. 2021)

> Insofar as relevant to this appeal, defendant pleaded guilty in 2008 to [DWI] (per se), a misdemeanor. In 2020, defendant moved, pursuant to CPL 160.59, to seal her conviction. The People did not oppose the motion, which the District Court denied without conducting a hearing. On appeal, defendant contends that the court improvidently exercised its discretion in refusing to seal defendant's conviction of [DWI].
>
> Upon a review of the record, we find that the District Court did not improvidently exercise its discretion in denying defendant's motion. The court considered the nonexhaustive relevant factors identified in CPL 160.59(7) to make the discretionary determination that granting defendant's motion to seal the conviction was not warranted, and we find no basis to disturb that determination.
>
> Accordingly, the order is affirmed.

(Citations omitted).

Even if a DWI is sealed pursuant to CPL § 160.59, DMV will not recognize the sealing for purposes of 15 NYCRR § 136.5. See **Matter of Boyle v. Dep't of Motor Vehicles**, Index No. 903653-21 (Albany Co. Sup. Ct., decided July 29, 2021).

Attempt to Vacate Points in Order to Bypass DMV Regulations

People v. Gallagher
2020 WL 8258741
(Rye City Ct. 2020)

> In 2012, the Commissioner of the Department of Motor Vehicles promulgated new rules and regulations relating to the licensure of applicants with multiple drug or alcohol driving convictions. * * *
>
> According to DMV records, defendant had 3 DWI convictions and 20 points from 5 convictions within the look back period. * * *
>
> [A] person with 3 or 4 DWI-related convictions/incidents and 1 or more Serious Driving Offenses within the 25-year look-back period whose driver's license is currently revoked for any reason will *never* be relicensed. * * *
>
> To avoid the criteria of having 20 or more points, defendant now moves pursuant to CPL § 440.10(1)(h) to vacate [a] 6 point, 2001 speeding ticket from Rye so as to reduce the amount of points he collected to less than 20, removing him from the serious driving offense category. * * *
>
> [W]ere the Court to grant the Defendant's motion, it would, in effect, be invalidating the Regulations as applied to the Defendant. In light of his driving history, the Defendant appears to be exactly the type of problem driver the Regulations were promulgated to address. The Court will not intrude upon the province of the Commissioner of the Department of Motor Vehicles by vacating guilty pleas.

(Citation and footnote omitted). See also **People v. Boyles**, 2021 WL 2372284 (Pleasant Valley Just. Ct. 2021) ("Granting the Defendant's application to vacate this conviction, and in essence invalidating the regulation as applied to this Defendant, without the Commissioner of the Department of Motor Vehicles being given an opportunity to be heard, is not something this Court will

entertain").

Belated CPL § 440.10 Motion Denied

People v. Dickson
2020 WL 5362154
(App. Term, 9th & 10th Jud. Dist. 2020)

> On March 9, 2008, defendant was issued [3] simplified traffic informations charging him with, respectively, [DWI] (common law), refusal to submit to a breath test and driving across hazardous roadway markings. On August 6, 2008, defense counsel stated on the record that defendant was pleading guilty to violating subsection 7 of [VTL] § 1192, which does not delineate any unlawful act, instead of the correct subsection, 3. Defense counsel, the prosecutor and the court overlooked this error, and, during the plea allocution, defendant admitted to driving while "in an intoxicated condition," which tracks the language of [VTL] § 1192(3). * * *
>
> Nearly a decade after his guilty plea, on May 7, 2018, defendant filed a motion pursuant to CPL 440.10(1)(h) to vacate the judgment of conviction because of this shortcoming. * * *
>
> The Justice Court, in an order dated July 2, 2018, granted defendant's motion. * * *
>
> Defendant's . . . apparent plea of guilty to a nonexistent offense seems to have been either a simple misstatement by defense counsel, or a scrivener's error in preparing the transcript of the plea colloquy. If it were an attorney misstatement, and defendant wanted to claim that it rendered his plea a nullity, such an argument could have been addressed on direct appeal. Thus, defendant's failure to take such an appeal remains unjustified and the court's order violated the clear proscription of CPL 440.10(2)(c) against addressing the merits of defendant's motion.

(Citations omitted).

There Is No Right to Discovery Prior to Issuance Of DNA Search Warrant

People v. Goldman
35 N.Y.3d 582, 135 N.Y.S.3d 48
(2020)

> In Matter of Abe A., we sanctioned the use of a search warrant pursuant to CPL article 690 for the seizure of corporeal evidence from an uncharged suspect. Since the seizure required a bodily intrusion, the Court, using a Fourth Amendment reasonableness analysis, set forth a [3]-prong standard, requiring the People to demonstrate probable cause to believe the individual committed the crime, a "clear indication" that material and relevant evidence will be found, and that the means of obtaining the evidence is "safe and reliable." . . . Generally, when the corporeal evidence sought is not subject to alteration or destruction, there is no exigency and the search warrant application must be brought on notice to the suspect. The primary issue presented by this appeal is whether Abe A. and the constitutional right against unreasonable search and seizure requires that, prior to a neutral magistrate's issuance of a search warrant to obtain DNA evidence from a suspect's body by buccal swab, a suspect must receive -- in addition to notice and the opportunity to be heard -- discovery as to the demonstration of the probable cause in the warrant application and an adversarial hearing. We hold that there was no violation of any constitutional rights, as defendant, provided with an opportunity to be heard on the issuance of the warrant, directed no argument to the magistrate as to the reasonable nature of the bodily intrusion sought.

(Citations omitted).

Applicability of "Two-Hour Rule" to Chemical Test Refusals

Matter of Endara-Caicedo v. New York State Dep't of Motor Vehicles
180 A.D.3d 499, 115 N.Y.S.3d 880
(1st Dep't 2020)

> [VTL] § 1194(2) permits the refusal of a motorist arrested for operating a motor vehicle while under the influence of alcohol or drugs to submit to a chemical test to be used against the motorist in administrative license revocation hearings even if the chemical test is offered, and the refusal occurs, more than two hours after the motorist's arrest. This interpretation of the statute is supported by its legislative history, which indicates that the two-hour time limitation in [VTL] § 1194(2)(a)(1) was confined to the admissibility of the chemical test results (or the chemical test refusal) in a criminal action against the motorist and kept separate from the deemed consent and license revocation provisions until 1970, when the Legislature merely "redrafted the piecemeal revisions of" the [VTL] from the preceding decades; the recent opinions of four Judges of the Court of Appeals; the longstanding public policy of this State, and this Nation, to discourage drunk driving in the strongest possible terms; and the same conclusions reached by courts of sister states that have similar statutory regimes.

(Citations omitted). See generally **People v. Odum**, 31 N.Y.3d 344, 78 N.Y.S.3d 252 (2018).

NOTE: This case is currently pending before the Court of Appeals.

Felony DWI Conviction Dismissed on Appeal Due to Insufficient Evidence

People v. Bradbury
183 A.D.3d 1257, 123 N.Y.S.3d 367
(4th Dep't 2020)

At approximately 6:00 a.m. on the day in question, a passing motorist observed defendant outside of her car, which was stuck in the brush 20 to 30 feet off the roadway. The motorist stopped to offer assistance, but defendant said that she was all right and did not want the motorist to call 911. She said that another person had been driving the car when the car crashed and had fled the scene. The motorist called 911.

A State Police investigator responded to the scene and spoke with defendant. Defendant stated that she had met an individual named Paul at a nearby bar, where she drank [3] glasses of wine, and that they left the bar together at approximately 3:00 a.m. She further stated that Paul drove the car and, after crashing the car, he fled the scene on foot. She described Paul only as being approximately 5 feet 10 inches tall. The investigator performed field sobriety tests on defendant and concluded that defendant was intoxicated. A subsequent chemical test measured defendant's blood alcohol content at .10%. * * *

[W]e . . . conclude that the jury was not justified in finding defendant guilty beyond a reasonable doubt.

Defendant's assertion that the car had been operated by an individual named Paul was not inconsistent with the evidence at trial. . . . Giving the evidence the weight it should be accorded, . . . we find that the People failed to establish, beyond a reasonable doubt, that defendant operated the car that had gone off the roadway.

DWAI Conviction Dismissed on Appeal Due to Insufficient Evidence

People v. Koukhta
2021 WL 2559576
(App. Term, 9th & 10th Jud. Dist. 2021)

Defendant, a builder, testified that, after work, he had met with a friend at a local bar where he had [1] beer. While driving home, he swerved his pickup truck to avoid hitting a deer. He explained that his truck became lodged atop a tree stump off of the road, and he was unable to move it. Because it was dark, cold and rainy, and he needed to feed his cat, defendant left his truck and walked home. Once home, cold and frustrated about his predicament, defendant drank [2] more beers, as well as an unspecified quantity of Johnnie Walker Red Label scotch directly from the bottle. * * *

Defendant's testimony that, after getting home and feeling the weight of his frustration, he drank more beers and scotch to the point of extreme intoxication, is not incredible. In light of the People's inability to refute defendant's reasonable and internally consistent explanation for how he became intoxicated during the [2]-hour time period between the accident and the trooper's arrival at his doorstep, and defendant's explanation for the accident, there was reasonable doubt as to whether defendant was intoxicated at the time he was driving.

The apparent contradiction between defendant's testimony about how much, and what type of, alcohol he drank and when he drank each type, and the trooper's testimony about what defendant told him, is easily explained away by defendant's extreme intoxication, as observed by the trooper. * * *

Accordingly, the judgment of conviction is reversed and the accusatory instrument is

dismissed.

Obstructing Governmental Administration ("OGA")

People v. Johnson
195 A.D.3d 859, 145 N.Y.S.3d 844
(2d Dep't 2021)

[T]he evidence was legally insufficient to sustain the conviction of [OGA 2nd]. A person is guilty of [OGA 2nd] when that person "intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference." The interference must be "in part at least, physical in nature," but "criminal responsibility should attach to minimal interference set in motion to frustrate police activity." Here, according to the arresting officers' testimony, the defendant was argumentative throughout the traffic stop and arrest-booking process, repeatedly refused to answer the officers' questions, and refused to participate physically in any way in the arrest-booking process, including refusing to stand for a photograph, to provide his fingerprints, or to sign a Miranda form. The People concede that the defendant did not physically resist the officers, but argue that his conduct constituted physical interference because he refused to cooperate physically in the arrest-booking process. However, neither the defendant's conduct during the traffic stop nor his conduct during the arrest-booking process constituted a knowing, physical interference with, and disruption of, the official function being performed by the officers. The defendant did not struggle, physically resist, or do anything to interfere with the officers, and he did not intrude into, or get in the way of, any ongoing police activity. The defendant's passive unwillingness to cooperate with the officers during the traffic stop and arrest-booking process lacked the requisite intentional physical component.

(Citations omitted).

Conflict of Interest

People v. Wentland
191 A.D.3d 704, 139 N.Y.S.3d 356
(2d Dep't 2021)

> Nicholas Wentland [Nicholas] allegedly was driving while under the influence of alcohol, and was stopped by police officers. When Nicholas' father [the defendant], arrived at the scene, the defendant allegedly assaulted and injured one of the officers. According to the defendant, he had been informed that Nicholas was involved in an automobile accident in which Nicholas "went through the windshield," and the defendant "rushed into the accident scene yelling for [Nicholas]," where he was forcibly stopped and injured by police officers on the scene. The defendant was charged with, inter alia, [Assault 2nd] and [Obstructing Governmental Administration 2nd], and Nicholas was charged under the same indictment with [Obstructing Governmental Administration 2nd] and two counts of [DWI].
>
> At an arraignment on November 27, 2018, [defense counsel] advised the County Court that he was representing both the defendant and Nicholas because they were "united in interest."

As it turns out, the defendant and Nicholas were *not* united in interest. Rather, [defense counsel] presented the pair with a "package deal" pursuant to which the defendant was in effect forced to "take one for the team" in order to help out Nicholas. The defendant accepted the deal, but thereafter hired new counsel and moved to withdraw his plea. County Court denied the motion. To make matters worse, at sentencing:

> County Court found that the defendant violated the terms of his plea by maintaining his innocence, and thereupon imposed an "enhanced sentence" of concurrent terms of [6] months' imprisonment on each of the defendant's convictions.

The Appellate Division reversed and granted the defendant's motion to withdraw his plea.

Withdrawal of Guilty Plea

People v. Swain
192 A.D.3d 827, 143 N.Y.S.3d 104
(2d Dep't 2021)

> Here, the plea bargaining process and the defendant's affidavit raise a legitimate question as to the voluntariness of the defendant's plea and, therefore, the defendant's motion [to vacate his plea] should not have been denied without a hearing. The County Court's response to defense counsel's questions regarding bail, which included a statement that this was the defendant's "last chance" to accept the offer, raise a legitimate question as to whether the defendant understood that the court's purportedly forthcoming bail decision was contingent on acceptance of the offer. Notably, after the defendant accepted the plea, the court never brought up the issue of changing the defendant's bail status, effectively continuing his release on cash bail without any changes. * * *
>
> Accordingly, we remit the matter to the County Court, Orange County, for further proceedings, including a hearing on the defendant's motion to withdraw his plea of guilty, and thereafter a report to this Court as to the County Court's findings with respect to whether the defendant has established his entitlement to withdraw his plea.

(Citations omitted).

Consequence of Defendant's Failure to Appear For Pre-Trial Hearing

People v. Taylor
2020 WL 1907848
(App. Term, 9th & 10th Jud. Dist. 2020)

> On August 7, 2017, defendant was present in court when the court directed that a previously ordered combined Huntley/Mapp/Dunaway hearing would begin that afternoon. However, defendant failed to appear for the hearing, and a bench warrant was issued. On September 11, 2017, defendant was returned to court on the bench warrant. Over defendant's objection, the court held that defendant had waived his right to the pretrial hearing by having failed to appear. * * *
>
> A defendant has a right to be present at all material stages of his trial, including pretrial hearings. A defendant can expressly waive his right to be present or his waiver can be implied by certain conduct on his part, as long as he has been advised by the court of the consequences which can result if he fails to appear. "Even where a court has not warned a defendant that a hearing or trial will continue in his absence, he may forfeit his right to be present where he is told that a hearing is about to begin and then deliberately fails to reappear in court."
>
> "Although a defendant may forfeit his right to be present, he does not as a consequence of his actions waive his right to a hearing or a trial." "His forfeiture merely allows the court to try him in absentia." Therefore, the District Court erred in concluding that defendant's failure to appear in court constituted a forfeiture of his right to a hearing.

(Citations omitted).

Voluntariness of Plea

People v. Principato
194 A.D.3d 851, 147 N.Y.S.3d 135
(2d Dep't 2021)

> At the plea proceeding, the County Court informed the defendant, in effect, that he could be sentenced to consecutive terms of imprisonment on the convictions of [AUO 1st], a class E felony, and [DWI], an unclassified misdemeanor. However, pursuant to [PL] § 70.35, if the defendant were convicted of both counts, his corresponding sentences would run concurrently by operation of law. As such, the court incorrectly informed the defendant that he could be sentenced to a term of imprisonment up to 2⅓ to 5 years, when in fact, the maximum aggregate sentence was a term of imprisonment of 1⅓ to 4 years.
>
> Notwithstanding the County Court's misstatement, the circumstances of the plea in its totality establish that it was voluntarily entered. The record reflects that the defendant agreed to plead guilty before the court made the misstatement in question, the defendant had experience with the criminal justice system, and the plea bargain was advantageous in light of an agreement that the defendant's sentence would run concurrently to an indeterminate sentence the defendant already was serving on a Bronx County felony conviction. Further, there is no indication in the record that the defendant relied upon an incorrect understanding of his sentencing exposure in deciding to plead guilty. On this record, it cannot be said that the defendant's plea of guilty was not knowing, voluntary, and intelligent.

(Citations omitted). See generally **People v. Trombley**, 115 A.D.3d 1114, 982 N.Y.S.2d 791 (3d Dep't 2014) (defendant sentenced to 5⅓ to 16 years for plea of guilty to, *inter alia*, Vehicular Manslaughter 1st and Vehicular Assault 2nd arising out of same accident); **People v. Novak**, 30 N.Y.3d 222, 66 N.Y.S.3d 147 (2017) (Judge in a bench trial cannot also decide the appeal

of his own verdict).

Sufficiency of Guilty Plea

People v. Velazquez-Hernandez
193 A.D.3d 1084, 145 N.Y.S.3d 602
(2d Dep't 2021)

> The defendant pleaded guilty to [2] counts of [DWI], [AUO 1st], false personation, and operating a motor vehicle without a left side mirror.
>
> "A trial court is constitutionally required to ensure that a defendant, before entering a guilty plea, has a full understanding of what the plea entails and its consequences." Here, under the particular circumstances of this case, the County Court failed to ensure that the defendant understood the rights he would be giving up by pleading guilty. Moreover, the court failed to ensure that the defendant "ha[d] a full understanding of what the plea connote[d] and of its consequence." The court failed to inform the defendant that he would be giving up his right to a trial by jury, of the People's obligation to prove his guilt beyond a reasonable doubt, or of his right against self-incrimination.
>
> Accordingly, notwithstanding the defendant's failure to preserve his arguments for appellate review, upon review in the exercise of our interest of justice jurisdiction, the defendant's plea and the sentence imposed thereon must be vacated, and the matter remitted to the County Court, Suffolk County, for further proceedings on the indictment.

(Citations omitted). Cf. **People v. Conceicao**, 26 N.Y.3d 375, 379, 23 N.Y.S.3d 124, 126-27 (2015) ("The primary issue in these appeals is whether defendants entered knowing, intelligent and voluntary guilty pleas when the trial courts failed to mention the constitutional rights defendants were waiving -- the right to a trial by jury, the right to confront one's accusers and the privilege against self-incrimination. We hold that the failure to recite the Boykin rights does not automatically invalidate an otherwise voluntary and intelligent plea. Where the record as a whole affirmatively shows that the defendant intentionally relinquished those rights, the plea will be upheld") (citation

omitted).

Court must Advise Defendant of Direct Consequences of Plea

People v. Dillon
195 A.D.3d 747, 145 N.Y.S.3d 366
(2d Dep't 2021)

> Appeal by the defendant from a judgment of the Supreme Court, Nassau County . . ., rendered September 6, 2019, convicting him of [Aggravated DWI] in violation of [VTL] § 1192(2-a)(a), [Assault 2nd], and [Aggravated Vehicular Assault], upon his plea of guilty, and imposing sentence.
>
> ORDERED that the judgment is reversed, on the law, the plea is vacated, and the matter is remitted to the Supreme Court, Nassau County, for further proceedings in accordance herewith.
>
> The Supreme Court failed to advise the defendant at the time of his plea of guilty to [3] counts of the indictment that he would be sentenced upon his conviction of [Assault 2nd] to a period of postrelease supervision. Under the circumstances, the defendant's plea of guilty was not knowing, voluntary, and intelligent, and therefore, must be vacated. Contrary to the People's contention, the defendant's plea of guilty to each count must be vacated, since the counts are all part of [1] indictment and [1] judgment, and the sentences imposed were to run concurrently with each other.

(Citation omitted). See also **People v. Nguyen**, 191 A.D.3d 1329, 137 N.Y.S.3d 804 (4th Dep't 2021) (felony Aggravated DWI plea vacated on ground that "before [defendant] pleaded guilty, Supreme Court failed to inform him that a fine would be imposed and failed to advise him that, following his indeterminate term of imprisonment, he would be subject to a mandatory [3]-year period of conditional discharge, during which he would be required to install and maintain an [IID] in his vehicle").

CPL § 30.30 -- Applicability to Traffic Infractions

Effective January 1, 2020, CPL § 30.30 now applies to traffic infractions *that are accompanied by one or more felonies, misdemeanors or violations*. See CPL § 30.30(1)(e) ("for the purposes of this subdivision, the term offense shall include vehicle and traffic law infractions"); CPL § 30.30(2)(e) (same).

People v. Galindo
70 Misc. 3d 16, 127 N.Y.S.3d 223
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

> While the misdemeanor charges clearly must be dismissed, it had been the case, when defendant's dismissal motion was decided on July 27, 2015, that "CPL 30.30 does not apply to traffic infractions." However, on January 1, 2020, an amended CPL 30.30 statute went into effect that abrogated the case law on this point, and explicitly brought traffic infractions within its ambit. Under the amended statute, in a criminal case, such as this, where a defendant is charged with both a misdemeanor for which more than [3] months' incarceration is possible and a traffic infraction, the People are provided with a 90-day "clock" within which they must be ready for trial.
>
> Thus, the question of first impression we now must answer is whether, for this direct appeal, we must follow the prior statute, in effect at the time of defendant's conviction, under which the traffic infractions could not be dismissed, or the current, amended CPL 30.30 statute, requiring dismissal of the traffic infractions along with the misdemeanors. * * *
>
> Pursuant to the Matter of Lambrou presumption in favor of deciding appeals under the current statutory regime, combined with the Pepper factors that advise the same, we apply the amended CPL 30.30 statute and find that the statutory period within which to prosecute all of the misdemeanors and traffic infractions charged in the misdemeanor information has expired.

(Citations omitted).

CPL § 30.20 -- Applicability to Traffic Infractions

CPL § 30.20 and the constitutional right to a speedy trial have always applied to traffic infractions. See, e.g., People v. Taylor, 189 Misc. 2d 313, 731 N.Y.S.2d 324 (App. Term, 2d Dep't 2001). However, winning a traffic infraction case on this ground can be difficult. See, e.g., **People v. Ramlall**, 2018 WL 1735440 (App. Term, 2d, 11th & 13th Jud. Dist. 2018) (32-month delay between arrest and plea to DWAI did not violate constitutional right to speedy trial), **aff'd**, 34 N.Y.3d 1154, 119 N.Y.S.3d 769 (2020) ("Though a close case, we conclude that, after balancing the relevant factors, defendant's claims do not rise to the level of a constitutional violation").

Insufficient Evidence of Assault 3rd Where Defendant Acquitted of DWAI Drugs

People v. Romeiser
185 A.D.3d 1431, 125 N.Y.S.3d 827
(4th Dep't 2020)

Defendant was acquitted of Vehicular Assault and DWAI Drugs -- but was convicted of Assault 3rd -- arising out of an accident where defendant ran a stop sign in Canandaigua after ingesting a prescription dose of Tramadol. On appeal, the Appellate Division, Fourth Department, held as follows:

> On appeal from a judgment convicting her upon a jury verdict of [2] counts of [Assault 3rd], defendant contends that the conviction is not supported by legally sufficient evidence with respect to the element of recklessness. Defendant failed to preserve that contention for our review, however, "because [her] motion for a trial order of dismissal 'was not specifically directed at the ground[] advanced on appeal.'" We nevertheless exercise our power to review her challenge as a matter of discretion in the interest of justice.
>
> We agree with defendant that the conviction of both counts of [Assault 3rd] is not supported by legally sufficient evidence. The evidence submitted by the People is insufficient to establish that defendant acted recklessly, "i.e., that [s]he perceived a substantial and unjustifiable risk of [injury] and that [her] conscious disregard of that risk constituted a gross deviation from the standard of conduct that a reasonable person would observe in that situation."

(Citations omitted).

Driver's License Cannot Be Revoked for Boating-Related Homicide

People v. Wisniewski
191 A.D.3d 1435, 142 N.Y.S.3d 260
(4th Dep't 2021)

This is an unusual case in which the defendant was convicted of Criminally Negligent Homicide based on a theory of accessorial liability (*i.e.*, the defendant was convicted of Criminally Negligent Homicide even though he was not driving the boat at the time of the accident).

> Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminally negligent homicide and [2] counts of operating a vessel while under the influence of alcohol or drugs. This case arises from an incident in which a 16-year-old girl died after she struck her head on a bridge while riding as a passenger in a motor boat passing underneath it. The evidence presented at defendant's trial established that defendant owned the boat and, just prior to the incident, had allowed his 17-year-old codefendant to pilot it, with defendant and the victim as passengers. * * *
>
> [T]he court lacked the authority to revoke defendant's driver's license as part of his sentence pursuant to [VTL] § 510(2) because the victim's death did not result from the operation of "a motor vehicle or motorcycle," and we therefore further modify the judgment accordingly.

(Citations omitted).

Meritorious 2-Hour Rule Motion Properly Denied as Untimely

People v. Marte
___ A.D.3d ___, ___ N.Y.S.3d ___, 2021 WL 3411303
(1st Dep't 2021)

> At issue on this appeal is whether the trial court providently exercised its discretion in denying, as untimely, defendant's midtrial motion to suppress the results of an Intoxilyzer breath test on the ground of lack of valid consent to take the test. We find that the court properly exercised its discretion because defendant never moved to suppress on this ground, expressly declined to raise this claim at a pretrial suppression hearing dealing with other issues, and provided no basis for finding that he could not, with due diligence, have been previously aware of the issue, or that he had good cause for not raising it earlier. We respectfully disagree with the dissent because it goes to the merits and not the timeliness of this motion. * * *
>
> Defendant's reliance on People v. Odum is misplaced. Odum goes to the validity of the Intoxilyzer breath test, not the timeliness of the suppression motion. Nor does it provide an excuse for counsel's inexplicable failure, after being asked by the court whether defendant intended to advance suppression claims regarding the events relating to the Intoxilyzer test, to expand the scope of the pretrial suppression to include arguments based on Odum. * * *
>
> The dissent attributes counsel's failure to make a timely motion as inadequate assistance of counsel. This argument is not advanced on appeal and is not properly before us.

(Citation omitted).

Notably, the dissent pointed out that the likely reason why an ineffective assistance of counsel claim was not raised on appeal was because "the same counsel who failed to challenge the voluntariness of the Intoxilyzer test, in the otherwise timely

omnibus motion, is the same counsel who represents defendant on this appeal."

Multiplicity

People v. O'Brien

186 A.D.3d 1406, 130 N.Y.S.3d 494
(2d Dep't 2020)

Defendant was charged with, and convicted of, Manslaughter 2nd, 4 counts of Vehicular Manslaughter 2nd, VTL §§ 1192(2), 1192(3), 1192(4) and 1192(4-a), and Reckless Driving. The 4 counts of Vehicular Manslaughter 2nd involved the same victim and the same conduct, but each count accused the defendant of committing the offense by violating a distinct subdivision of VTL § 1192 (*i.e.*, VTL § 1192(2), VTL § 1192(3), VTL § 1192(4) and VTL § 1192(4-a)). The Appellate Division, Second Department, dismissed 3 of the 4 counts of Vehicular Manslaughter 2nd on the ground that they were multiplicitous, holding that:

> The defendant was charged with [4] counts of [Vehicular Manslaughter 2nd]. . . . Counts 4 through 7 of the indictment were predicated on the defendant's alleged violation of [4] distinct subdivisions of [VTL] § 1192.
>
> While the People contend that each count of vehicular manslaughter required them to prove additional facts that the others did not, in fact, the People were only required to prove that the defendant violated [1] subdivision of [VTL] § 1192 in order to prove his guilt under Penal Law § 125.12(1). The People's election to proceed on a theory that the defendant had violated more than [1] such subdivision by presenting evidence of his multiple, distinct manners of intoxication was not necessary to establish his guilt. Thus, a conviction on [1] count of [Vehicular Manslaughter 2nd] would have been inconsistent with an acquittal on any other count charging the same offense predicated upon a different manner of intoxication. Accordingly, . . . counts 5, 6, and 7 of the indictment were multiplicitous of count 4. Although the dismissal of the multiplicitous counts will not affect the duration of the defendant's sentence of imprisonment, it is nevertheless appropriate to dismiss these counts in consideration of the stigma attached to the redundant convictions.

(Citations omitted).

Conviction of Higher Level Offense Mandates Dismissal of Lesser Included Offense(s)

A common error in vehicular crimes trials is that the defendant winds up convicted of lesser included offenses (e.g., Vehicular Assault 2nd and DWI). In submitting such charges to the jury, CPL § 300.40(3)(b) provides, in pertinent part, that:

> With respect to inclusory concurrent counts, the court must submit the greatest or inclusive count and may or must, under circumstances prescribed in [CPL §] 300.50, also submit, but in the alternative only, one or more of the lesser included counts. A verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted, but not an acquittal thereon. A verdict of guilty upon a lesser count is deemed an acquittal upon every greater count submitted.

See also CPL § 300.30(4).

People v. Ferguson

193 A.D.3d 1253, 147 N.Y.S.3d 204
(3d Dep't 2021)

> [A]s the People correctly concede, defendant's convictions for [Vehicular Manslaughter 1st], reckless driving and [DWI] under counts 7, 12, 13 and 14 of the indictment must be dismissed as inclusory concurrent counts of his convictions for aggravated vehicular homicide. Similarly, defendant's conviction for [Vehicular Assault 1st] under count 9 of the indictment must be dismissed as an inclusory concurrent count of aggravated vehicular assault.

(Citations omitted).

People v. O'Brien
186 A.D.3d 1406, 130 N.Y.S.3d 494
(2d Dep't 2020)

> As the People concede, the defendant's convictions of [DWI] in violation of [VTL § 1192(2) and (3)] and driving while ability impaired under [VTL § 1192(4) and (4-a)] are inclusory concurrent counts of [Vehicular Manslaughter 2nd]. Accordingly, those convictions must . . . be reversed.

(Citations omitted).

Joinder/Severance

People v. Santiago
190 A.D.3d 502, 140 N.Y.S.3d 29
(1st Dep't 2021)

Judgment . . . convicting defendant of leaving the scene of an incident without reporting and [DWAI] . . . unanimously reversed, on the law and the case remanded for new trials.

Defendant's motion to sever the trials of the [2] counts of which he was convicted should have been granted. The conviction for leaving the scene of an incident without reporting occurred on a different date and was based upon a different set of facts than the conviction for [DWAI]. * * *

[N]one of the proof necessary for each offense was material to the other. The facts underlying defendant's conviction for leaving the scene of an accident stemmed from a September 4, 2011 incident. The victim was lying on the road of the Henry Hudson Parkway. After other drivers stopped to try and pull the victim out of the road, a dark Acura ran him over and continued driving without stopping. The victim was pronounced dead at the scene. There was video footage and still pictures from the toll plaza that showed the cars of the drivers who stopped to help, followed immediately by the dark Acura. The footage showed images of the cars, their drivers and their respective license plates. Defendant was the registered owner of the dark Acura.

The DWI conviction was based on an incident that occurred [4] months later, on January 15, 2012. . . . The officer who arrested defendant for the DWI was permitted to testify relative to the charge of leaving the scene that he recognized the vehicle and driver in the video and stills taken on September 4, 2011 as the same vehicle and person he stopped on January 15, 2012.

(Citation omitted).

Defendant's Right to Proceed *Pro Se*

People v. Neofytides

2021 WL 1396573
(App. Term, 2d, 11th & 13th Jud. Dist. 2021)

Defendant was charged in an accusatory instrument with [DWI] (common law) and failing to signal. On multiple dates, and before different judges of the Criminal Court, defendant insisted upon waiving counsel and representing himself at a suppression hearing and a jury trial, which request the court granted . . . . The jury subsequently found defendant guilty of both charges. * * *

Defendant now protests that the court's grant of a waiver of counsel pursuant to his request was improvident. We disagree. The Criminal Court repeatedly implored defendant to reconsider his request. The court informed defendant of the seriousness of this case, discussed his exposure to incarceration, questioned his understanding about various legal rules and concepts, and compared his high school education with that of an attorney, all to no avail. Defendant was insistent in his timely and unequivocal request to proceed pro se. The one-time comment by counsel during an early court appearance that defendant "is a step away from a 730" was rightly disregarded by the court. The statement was unaccompanied by any explanation, evidence or a request for a CPL article 730 examination. Further, it is clear from his on-the-record behavior throughout the nearly [3]-year life of this case, including his self-representation during the suppression hearing and jury trial, that defendant never "'engaged in conduct which would prevent the fair and orderly exposition of the issues.'"

Defendant's claim, again without explanation, that, because of his homelessness, the court should have denied his request for a waiver of counsel is plainly without merit.

(Citations omitted).

Do Multiple Fines for Multiple DWI Convictions Arising Out of Same Act Violate Double Jeopardy?

People v. McKiernan
70 Misc. 3d 79, 138 N.Y.S.3d 797
(App. Term, 9th & 10th Jud. Dist. 2020)

> [D]efendant was arraigned, insofar as relevant to this appeal, on [3] uniform traffic tickets (UTTs) charging him with, respectively, [aggravated DWI], [per se DWI] and [common law DWI], all stemming from a single act of driving. * * *
>
> [D]efendant pleaded guilty to the [3] charges -- [aggravated DWI], [per se DWI] and [common law DWI] -- and was allocuted. [On the sentencing date,] defendant objected on double jeopardy grounds to the imposition of [3] separate fines since his convictions were all based upon a single act of driving. * * *
>
> Defendant . . . argues on appeal, in effect, that the limiting language in the text of [PL] § 80.15, that proscribes applying its prohibition against the imposition of multiple fines for multiple convictions arising from a single act to the [VTL], is unconstitutional, as the issuance of [3] fines pursuant to separate [VTL] convictions predicated upon a single act of driving contravened his constitutional right against double jeopardy. However, defendant has "provided no proof that the Attorney General was notified of his challenge to the constitutionality of [Penal Law § 80.15]. . . . As such, this Court will not reach this issue on appeal."

(Citations omitted).

PL § 80.15 issues aside, where a person is convicted of a greater offense (such as aggravated DWI), punishing the person for a lesser included offense (such as per se DWI) is unconstitutional, because (a) a lesser included offense is the "same offense" for Double Jeopardy purposes, see, e.g., **Brown v. Ohio**, 432 U.S. 161, 97 S.Ct. 2221 (1977), and (b) "[f]ines . . . are treated in the same way as prison sentences for purposes of double jeopardy and

multiple punishment analysis." **Jeffers v. United States**, 432 U.S. 137, 97 S.Ct. 2207 (1977).

When Can Police Officer Demand That Driver Exit Vehicle?

People v. Eugenio
185 A.D.3d 1050, 128 N.Y.S.3d 233
(2d Dep't 2020)

> At a suppression hearing, a police officer testified that, while on patrol on November 12, 2017, he observed an individual who seemed to be passed out behind the wheel of a parked automobile. The officer approached the driver's side of the vehicle, observed the defendant hunched toward the steering wheel, and noticed that the car was running. The officer repeatedly knocked on the window of the vehicle to wake the defendant, who awoke in under one minute. The officer then asked the defendant to open the door and exit the vehicle. After the defendant exited the vehicle, the officer observed a plastic cup near the center console containing liquid and a bottle of scotch whiskey in the back seat. Moreover, the defendant exhibited several indicia of intoxication and told the officer that he had consumed two 24-ounce beers, leading the officer to place him under arrest [for DWI].

The Court held that the defendant was improperly requested to exit his vehicle, reasoning that:

> [T]he officer, upon observing the defendant unconscious behind the wheel of a parked vehicle with the engine running, had an objective, credible reason, not necessarily indicative of criminality, for his initial approach of the defendant's vehicle, authorizing him to request information from the defendant. The officer did not, however, request any information; he simply asked the defendant to exit the vehicle. Where, like here, a vehicle is lawfully parked on the street and neither it nor its occupant is under any restraint, and the police have no grounds to suspect the occupant of criminality at that point, requesting the occupant to step out of the vehicle creates a new, unauthorized restraint.

(Citations omitted).

People v. Spradlin
188 A.D.3d 1454, 136 N.Y.S.3d 517
(3d Dep't 2020)

There is no dispute here that Meskill was authorized to approach defendant's vehicle in response to a citizen-requested welfare check upon observing him slumped over with the engine running. Instead, defendant contends that he was unlawfully seized without reasonable suspicion when Meskill ordered him out of the vehicle immediately upon waking him and thereafter asked for his key fob. Although Meskill was permitted to ask for defendant's driver's license and to inquire about his reason for being at the shopping plaza during the initial level-one approach, he was not authorized to order defendant out of the vehicle immediately upon waking him. Nevertheless, no seizure occurred at that time, as defendant did not comply with Meskill's request to exit and freely continued the conversation.

Thereafter, Meskill noticed that defendant had difficulty retrieving his license, appeared disoriented and was slurring his speech. Defendant also gave a suspicious explanation that he had been waiting for his girlfriend in the parking lot of a grocery store since 2:00 a.m. to go shopping and produced an expired rental agreement for the vehicle. . . . [T]his evidence, combined with the fact that the vehicle's ignition was running when Meskill first approached, gave Meskill reasonable suspicion to believe that defendant may have committed the crime of [DWI] or the crime of [DWAI Drugs], thereby justifying the seizure of defendant's key fob. Upon learning that defendant was known to carry a weapon and observing him stuff objects into the floorboard of the driver's seat, Meskill had reasonable suspicion to believe that defendant had committed a crime or that his safety was at risk, authorizing him to order defendant out of the vehicle at that time.

(Citations omitted). See also **People v. Hempfling**, 70 Misc. 3d 404, 134 N.Y.S.3d 687 (Webster Just. Ct. 2020).

Stop Based on Anonymous 911 Call

People v. Scottborgh
2021 WL 1521827
(App. Term, 9th & 10th Jud. Dist. 2021)

Defendant argues on appeal, among other things, that his initial seizure by the police pursuant to a traffic stop violated his Fourth Amendment right against unreasonable seizures. This preserved contention is correct. The rather minimal identifying information given by the anonymous 911 caller about an unidentified male slumped over at a specific location inside of a not uncommon vehicle did not provide the officers with the requisite probable cause to believe defendant [who was driving a similar vehicle in the parking lot of a nearby shopping center] committed a traffic infraction or reasonable suspicion that defendant had committed, was committing or would commit a criminal act.

The People's claim that the officers effected the traffic stop to check on defendant's welfare pursuant to their community caretaking function, and not to investigate a crime pursuant to their law enforcement duty, even if accepted as true, would not change this result. "A review of federal and state cases that have applied the community caretaking exception to the stop of a moving vehicle reveals that the appropriate standard is one of reasonableness." Therefore, before a police officer may effect a traffic stop for a welfare check of the driver or passengers of a vehicle, there must exist a reasonable "basis for the police to believe that [there] was [a] need of assistance prior to the stop of the car." In this case, based upon the information presented to the officers and their own observations, there simply was no reasonable basis for them to believe that defendant was the individual in distress about which the 911 call had been made.

(Citations omitted).

DWAI as Lesser Included Offense

People v. Viscaino
2020 WL 2968285
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

> Defendant's contention that the court erred in denying his request to submit to the jury the offense of [DWAI] ([VTL] § 1192[1]) specifically as a "lesser included offense" of [DWI] (per se) ([VTL] § 1192[2]) is without merit.
>
> Defendant's contention on appeal that the court erred in failing to submit to the jury the offense of [DWAI] ([VTL] § 1192[1]) as a lesser included offense of [DWI] (common law) ([VTL] § 1192[3]) is unpreserved for appellate review, and we decline to review it in the exercise of our interest of justice jurisdiction.

(Citations omitted).

Refusal to Charge DWAI as a Lesser Included Offense

People v. Sorrell
196 A.D.3d 923, ___ N.Y.S.3d ___, 2021 WL 2955794
(3d Dep't 2021)

> [T]he issue distills to whether a rational factfinder could find that defendant was only impaired and not intoxicated when operating his vehicle on the evening in question. At trial, McCargar described that defendant appeared to be "very stumbly" and "all over the place" when he came upon the accident. Gushlaw testified that, at [2] different points during his interactions with defendant, defendant reported that he had consumed "[7] to [9] beers." . . . Once at the barracks defendant attempted to "lower his blood alcohol [level]" by eating soap, and informed Gushlaw of this. Thereafter, defendant failed to follow instructions twice while conducting breath tests and, therefore, [3] attempts were made by defendant, the third such attempt resulted in an alcohol level of .12. * * *
>
> Based on the foregoing, County Court did not err in declining to instruct the jury as to the lesser included offense of [DWAI] as there is no reasonable view of the evidence to support a finding that defendant committed this lesser offense but not the greater offense of [DWI].

Witness' Prior DWAI Conviction Not *Brady* Material

People v. Bush
184 A.D.3d 1003, 126 N.Y.S.3d 570
(3d Dep't 2020)

> We . . . find that defendant's argument that the People committed a Brady violation to be without merit. Specifically, defendant argues that the People failed to timely disclose that the former employee had a violation for [DWAI] and, as a consequence, he was unable to effectively cross-examine this witness. This traffic infraction, however, is not considered a criminal conviction for impeachment purposes (see [VTL] § 155). Accordingly, we conclude that the People did not run afoul of their Brady obligations.

(Citation omitted).

Sufficiency of Supporting Deposition/DWI Bill of Particulars

People v. Ahmadzai
2020 WL 6052476
(Webster Just. Ct. 2020)

The Court addressed the issue of whether the officer's Supporting Deposition/DWI Bill of Particulars constituted a valid supporting deposition to a DWAI Drugs charge, and held that:

> [A] review of the fill in the box standard New York State Trooper supporting deposition filed herein sets out various indicia of intoxication, i.e. odor of alcoholic beverage, glassy eyes, impaired speech, impaired motor coordination[, which] seem more directed to a charge of common law intoxication rather than [DWAI Drugs]. Although both charges can have some similar indicia. There is also the allegation in said deposition that the defendant refused both the alcohol screening and chemical tests, which would apply to an alcohol related offense. Again the word document attached to the 710.30 Notice for reasons set out above could not be considered part of the supporting deposition. There is nothing in the check box supporting deposition that would support or tend to support the charge of [DWAI Drugs]. Therefore, the supporting deposition as it pertains to the charge of [DWAI Drugs] would be insufficient on its face. Any conclusion to the contrary would be purely speculative. Thus the accusatory instruments relative to the charge of [DWAI Drugs] must be dismissed as being insufficient on their face pursuant to CPL §§ 100.20 and 100.40(2).

See also id. ("A review of the supporting documents filed with this court fail to allege any factual allegations of an evidentiary character relative to the charges of speed not reasonable and prudent, improper/no signal, moved from lane unsafely and unregistered motor vehicle. In fact, the only mention of said charges in the check box supporting deposition is to simply set out the said statue [sic] sections with no descriptive language setting out what the defendant was alleged to have done. That does not constitute providing a supporting

deposition") (citations omitted).

Probable Cause to Arrest in DWAI Drugs Case

People v. Levine

___ Misc. 3d ___, ___ N.Y.S.3d ___, 2021 WL 3235272
(App. Term, 9th & 10th Jud. Dist. 2021)

> Here, we find that defendant's appearance and performance on the SFSTs established an impairment of the cognitive and physical functioning necessary for reasonable and prudent operation of a motor vehicle. However, the arresting officer's "training" with regards to impairment by drugs merely involved [2] days of lectures, PowerPoint slides, and videos. There was no testimony that any of the officer's training involved determining what drug or class of drugs was causing the impairment. While the arresting officer testified that he believed that defendant was impaired by a central nervous system (CNS) depressant, the People failed to elaborate or make any connection between that belief and this officer's training and experience. Moreover, the arresting officer admitted that he was told during his training that there are drugs, other than CNS depressants, that may mimic the signs of a CNS depressant and that, at the time of defendant's arrest, he did not know what medications defendant was taking. The fact that defendant was admittedly driving home from a funeral, lost control of his vehicle and rolled over could just as easily explain his poor performance on the SFSTs as the officer's assumption that it was caused by a drug-related impairment. * * *
>
> Notably absent from the suppression hearing was evidence of a pre-arrest admission that defendant had ingested a drug listed under [PHL] § 3306, physical evidence of drug use, such as actual possession of drugs or associated paraphernalia, or testimony by a sufficiently trained observer as to the association between consumption of a drug listed in [PHL] § 3306 and the physical manifestations of same.

(Citations omitted). See also **People v. Koszko**, 57 Misc. 3d 47, 62 N.Y.S.3d 682 (App. Term, 9th & 10th Jud. Dist. 2017).

Probable Cause to Arrest in VTL § 1192 Case

People v. Hillman
2021 WL 1096669
(App. Term, 9th & 10th Jud. Dist. 2021)

> At the probable cause hearing, the arresting officer testified that, before the dashboard camera recording device was activated, he had observed defendant's vehicle being operated erratically, including traveling at an "extremely slow" speed (i.e., 20 to 25 miles per hour in a 45 miles per hour zone) impeding traffic on a public highway, alternately slowing down and speeding up, and failing to maintain a lane. After defendant's vehicle was stopped, the officer observed defendant exhibit classic signs of intoxication -- having "extremely" bloodshot, watery eyes and an odor of alcohol on her breath -- and defendant admitted that she had consumed alcohol earlier that night.
>
> Following the hearing, the court expressly found the officer's foregoing testimony to be credible -- a finding that must be accorded deference unless clearly unsupported by the record -- and there is no reason on this record to disturb that credibility determination. However, contrary to the court's conclusion, we find that the evidence of defendant's erratic driving, defendant's appearance, the odor of alcohol and defendant's admission to alcohol consumption was sufficient to provide the officer with probable cause to arrest defendant at least for [DWAI], if not [DWI].

(Citations omitted).

Leaving the Scene of an Incident Without Reporting

People v. Sorrell
196 A.D.3d 923, ___ N.Y.S.3d ___, 2021 WL 2955794
(3d Dep't 2021)

> Defendant . . . argues that this conviction is against the weight of the evidence because he reported the accident to law enforcement "approximately 15 minutes after leaving the scene." To that end, Hunter McCargar testified that, while driving on the day of the accident at approximately 5:24 p.m., he came upon an accident involving a white "banged up" Subaru that had collided with a guiderail. . . . The call that McCargar placed [to report the accident] was admitted at trial through the testimony of a state trooper, who took the call when it came in at approximately 5:24 p.m.
>
> Another state trooper testified that a call was received at approximately 5:40 p.m. on December 15, 2018 from an individual who identified himself as defendant, during which the caller described that he had been in an accident. * * *
>
> On appeal, defendant relies upon the fact that "the accident occurred on a desolate mountain road" in crafting his argument that he was unable to call to report the accident until he arrived home. In this regard, the jury could have found that defendant, by calling in the accident about 15 minutes after it occurred, had reported the accident "as soon as physically able." However, inasmuch as McCargar testified that he called to report the accident from the scene without issue, the jury could infer that defendant was physically able to call the police from the site of the accident but chose not to and, instead, only did so after returning home and realizing he could be identified. Thus, . . . we find that the verdict was supported by the weight of the evidence.

(Citations omitted).

DWI-Related Discovery Issues

People v. Rozenel

2021 WL 399899
(Nassau Co. Dist. Ct. 2021)

The Defendant seeks an order compelling the People to produce raw data, which, according to the Defendant, was created during the Defendant's blood test and was used to generate the blood test records which have been produced by the People. The Defendant argues that the People are in constructive possession of this raw data, because they "chose to enlist the services of the Nassau County Medical Examiner to do their work necessary to bring these charges" and that the NCME was engaged in a law enforcement activity when it analyzed the Defendant's blood sample. * * *

The issue before the court is not whether the raw data which the Defendant seeks is subject to discovery. The issue is whether the raw data, which is in the actual possession of the NCME, is in the constructive possession, custody or control of the People. The plain language of the discovery statute, particularly CPL §§ 240.20(1)(j) and 240.20(2), which appear to recognize well established case law, provides the answer. * * *

The Legislature notably omitted laboratories and, specifically, medical examiner's offices from . . . CPL § 245.20(2). This . . . is consistent with extensive existing case law which provides that medical examiners' offices are not law enforcement agencies and are generally independent of the District Attorney's office. * * *

That branch of the Defendant's motion seeking an order compelling the People to produce the raw data files generated by the gas chromatograph used to perform a test of the Defendant's blood is denied.

(Citation omitted).

People v. Sellars

___ Misc. 3d ___, ___ N.Y.S.3d ___, 2021 WL 3521043
(Orange Co. Ct. 2021)

> This Court is of the opinion that the general nature of CPL § 245.20(1)(e) does not supersede the specific provision of CPL § 245.20(1)(b) regarding grand jury proceedings. CPL § 245.20(1)(b) provides that the transcripts of grand jury witness testimony is discoverable, not the preliminary notes, or shorthand used in the preparation of the transcript. The digital audio recording is akin to preliminary notes or shorthand, as it is utilized as a tool by the court reporter to produce an accurate and complete transcript of the testimony. The absence of any reference to or requirement that any preliminary notes, shorthand, or digital recordings be disclosed is evidence of the fact that their exclusion from disclosure was intended. The language of CPL § 245.20(1)(b) is clear and unambiguous. Accordingly, the People[] . . . are not required to provide the digital audio recording created by the stenographic machine.

People v. Williams

2021 WL 3356381
(N.Y. City Crim. Ct. 2021)

> The plain meaning of "all evidence and information that tends to impeach the credibility of a testifying prosecution witness. [w]hether [sic] or not in tangible form" encompasses all allegations, as well as the files, records and other materials "in tangible form" on which substantiated disciplinary findings against the People's officer witness are based. * * *
>
> Records of substantiated charges of failure to follow procedures, dishonesty, or other improper conduct are tangible evidence

and information that bear directly on an officer's credibility as a witness in any case, regardless of what might be the particular crime charged.

People v. Preston
70 Misc. 3d 355, 135 N.Y.S.3d 587
(Cohoes City 2020)

Preston argued that the Datamaster DMT subject test graph printout and raw data were discoverable materials because the materials were, although possessed and maintained by the Division of Criminal Justice Services ("DCJS"), records and data "relating to the criminal action or proceeding which were made by a public servant engaged in law enforcement activity." * * *

The prosecution concedes that the requested material is the type of material which it is mandated to provide the defendant. However, the prosecution claims that this material is not within its possession or control. . . . [T]he sole question is whether DCJS is an agency engaged in law enforcement activity. * * *

Part of DCJS's vast duties include maintaining the Datamaster DMT subject test graph printout and raw data for breathalyzer tests. DCJS does not create these records; it simply holds them. The maintenance of these records requires no affirmative action by DCJS -- it does not require DCJS to establish or collect data and more importantly, it does not require DCJS to make decisions based upon the data. Rather, the maintenance of records is purely a passive activity that arguably ensures fair play by placing data beyond tampering or manipulation. . . . [T]he mere holding of records by DCJS personnel . . . does not itself trigger law enforcement activity. * * *

Therefore, the court holds that the Datamaster DMT alcohol and breath profile

> graph and raw data in possession of DCJS is not part of the People's discovery obligation under CPL 245.20(1)(j). Consequently, the prosecution has complied with their obligations; defendant's motion is denied.

(Citation omitted).

Certificate of Compliance Issues

CPL § 245.50(3) provides that:

> Notwithstanding the provisions of any other law, absent an individualized finding of special circumstances in the instant case by the court before which the charge is pending, the prosecution shall not be deemed ready for trial for purposes of [CPL § 30.30] until it has filed a proper certificate pursuant to [CPL § 245.50(1)]. A court may deem the prosecution ready for trial pursuant to [CPL § 30.30] where information that might be considered discoverable under this article cannot be disclosed because it has been lost, destroyed, or otherwise unavailable as provided by [CPL § 245.80(1)(b)], despite diligent and good faith efforts, reasonable under the circumstances. Provided, however, that the court may grant a remedy or sanction for a discovery violation as provided by [CPL § 245.80].

CPL § 30.30(5) provides that:

> Whenever pursuant to [CPL § 30.30] a prosecutor states or otherwise provides notice that the people are ready for trial, the court shall make inquiry on the record as to their actual readiness. If, after conducting its inquiry, the court determines that the people are not ready to proceed to trial, the prosecutor's statement or notice of readiness shall not be valid for purposes of [CPL § 30.30]. Any statement of trial readiness must be accompanied or preceded by a certification of good faith compliance with the disclosure requirements of [CPL § 245.20] and the defense shall be afforded an opportunity to be heard on the record as to whether the disclosure requirements have been met. This subdivision shall not apply to cases where the defense has waived disclosure requirements.

People v. Quinlan
71 Misc. 3d 266, 142 N.Y.S.3d 305
(N.Y. City Crim. Ct. 2020)

> It was . . . improper for the People to file a certificate of compliance while acknowledging that some discoverable law enforcement materials and information had not been disclosed because they were not in their "actual possession." And the People cannot cure this incongruity by arguing, notwithstanding the truth of such argument, that they "made diligent efforts to obtain outstanding items." It follows, then, that the People's certificate of compliance filed on February 10, 2020, was invalid and, therefore, did not stop the speedy-trial clock.

(Citations omitted). See also **People v. Villamar**, 69 Misc. 3d 842, 132 N.Y.S.3d 593 (N.Y. City Crim. Ct. 2020) ("The [15] days is a deadline for discovery compliance at the risk of sanctions, it is not a grace period or a tolling of the speedy trial clock. The wording of the statute does not provide for any phase-in or grace period before the People answer ready"); **People v. Freeman**, 2020 WL 1854198 (N.Y. City Crim. Ct. 2020); **People v. Rambally**, 2020 WL 4779547 (Nassau Co. Dist. Ct. 2020). Cf. **People v. Roland**, 67 Misc. 3d 330, 121 N.Y.S.3d 550 (N.Y. City Crim. Ct. 2020) ("the Court concludes that, in the typical case, up to 15 days are excludable under C.P.L. § 30.30(4)(a)"); **People v. Percell**, 67 Misc. 3d 190, 119 N.Y.S.3d 731 (N.Y. City Crim. Ct. 2020).

People v. Perez
___ Misc. 3d ___, ___ N.Y.S.3d ___, 2021 WL 2521689
(Queens Co. Sup. Ct. 2021)

> An order deeming a certificate of compliance improper . . . necessarily amounts to a determination that the People's statement of readiness for trial is illusory. * * *
>
> In this court's view, good faith, due diligence, and reasonableness under the circumstances are the touchstones by which a certificate of compliance must be evaluated. Accordingly, upon a challenge to a

> certificate of compliance, the People must articulate their efforts to comply with CPL § 245.20(1) with respect to the statutory subsections or specific items of discovery at issue. If the People establish that they exercised due diligence and acted in good faith in filing their certificate, their certificate of compliance shall be deemed valid. This may be accomplished by recounting the steps they took to obtain certain materials or ascertain the existence thereof, explaining the reasons why particular items are outstanding, lost or destroyed, and submitting their good-faith arguments for why certain materials are not discoverable under the statute. On the other hand, where the People fail to set forth their efforts to locate items of discovery or determine that they do not exist, or the efforts they describe do not amount to due diligence, their certificate may be invalidated.

See also **People v. Alvarez**, 2021 WL 1377827 (Queens Co. Sup. Ct. 2021); **People v. Aviles**, 72 Misc. 3d 423, 148 N.Y.S.3d 659 (N.Y. City Crim. Ct. 2021).

People v. Georgiopoulos
2021 WL 1727831
(Queens Co. Sup. Ct. 2021)

> As discussed in detail above, by filing a certificate of compliance, a prosecutor is averring that "after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, [he or she] has disclosed and made available all known material and information subject to discovery." In this case, the court cannot conclude that the People exercised due diligence and made reasonable inquiries to ascertain the existence of material and information subject to discovery. Given the serious deficiencies in both the certificate of compliance and the People's explanation thereof, the court finds that it was not

reasonable under the circumstances. Further, the court does not have sufficient information to determine whether it was filed in good faith. Indeed, the People have not provided an adequate explanation for a single one of the missing items at issue. Accordingly, the court must conclude that the certificate is invalid and the People's concurrent statement of readiness was illusory.

(Citation omitted).

People v. Williams
2021 WL 3356381
(N.Y. City Crim. Ct. 2021)

The People's reliance on "good faith" and "due diligence" to avoid invalidation of the COC for failure to disclose [the police disciplinary] records is misplaced. In the context of the discovery statute "good faith" and "due diligence" concern the People's effort to ascertain the existence of discoverable material (as set out in CPL 245.20[1]) and to make that material available to the defense. The People have not shown efforts in that regard. They have failed to make available to the defendant the disciplinary records that are required by CPL 245.20(1)(k)(iv). That the People might have applied good faith and due diligence in making their own determination that disciplinary records do not -- or should not -- fall within the statute is of no moment. That is not the People's determination to make. CPL Article 245 relieves the People of having to define what is or is not discoverable. The list of what types of evidence must be disclosed was determined by the Legislature. And to the extent necessary, that list may be refined or interpreted by the court. It is for the People to diligently ascertain the existence of and disclose the items on the list -- not to determine what categories of evidence should be included on it.

(Citation omitted).

People v. Askin
68 Misc. 3d 372, 124 N.Y.S.3d 133
(Nassau Co. Ct. 2020)

> [T]he question before the court [is] whether the People are prohibited from filing a certificate of compliance until every document they know exists, and is held to be under their control, is physically turned over to the defense. The answer to that question required an analysis of the Legislature's intent. If physical possession was required (because the discovery was not lost or destroyed), there would be no need for the statute to delineate varying time frames for discovery, or to discuss continuing discovery, or to state that no sanction should arise from the filing of subsequent certificates of compliance or to allow for filings of certificates of compliance in "good faith." Moreover, there would be no need for a sanctions section and no need for a "prejudice" evaluation as detailed in CPL § 245.80. The Legislature simply needed to state that until and unless the People have every document that exists in a case in their possession, they should not file a certificate of compliance and should not announce readiness for trial. Such a position is not reasonable and clearly not what the Legislature intended.

(Citation omitted).

People v. Erby
68 Misc. 3d 625, 128 N.Y.S.3d 418
(Bronx Co. Sup. Ct. 2020)

> The defendant correctly notes that CPL § 245.50(3) requires the prosecution, "absent an individualized finding of special circumstances," to file a proper certificate of compliance before they may "be deemed ready" for trial. The defendant, however, mistakenly reads CPL § 245.50(1) for the uncompromising proposition that absent full compliance with the Article's automatic disclosure requirements, the prosecution may

> neither file a certificate of compliance nor rely upon Article 30.30(4) exclusions. * * *
>
> The Article's reference to "supplemental" certificates under CPL § 245.50(1) and the inclusion of remedies and sanctions for discovery violations of a material nature, inferentially, and powerfully, suggest that fidelity to an absolute, uncompromising and inflexible disclosure standard, for both the prosecution and the defense, is neither required or desirable. * * *
>
> To the extent, if any, that imprecise or inconsistent statutory provisions in the Article exist, this Court calls upon the legislature to consider clarifying and rectifying those provisions that, arguably, do not comport with the legislation's salutary intent.

See also **People v. Davis**, 70 Misc. 3d 467, 134 N.Y.S.3d 620 (N.Y. City Crim. Ct. 2020) ("Justice Hornstein's language in People v. Erby resonates with the court").

People v. Nelson
67 Misc. 3d 313, 119 N.Y.S.3d 837
(Franklin Co. Ct. 2020)

> [D]elayed disclosure does not, alone, require the striking of a certificate of readiness, especially where the defense has not alleged any prejudice. Even if prejudice is proven, the Court has other, less extreme, remedies available, such as giving the defense additional time respond to the new material. The Court considers the striking of a certificate of readiness to be a drastic remedy which should be used both sparingly and judiciously.

(Citation omitted).

People v. Gonzalez
2020 WL 4873901
(Kings Co. Sup. Ct. 2020)

> The absence of certain discovery items from the disclosure memorialized in the original certificate of compliance (such as the scratch complaint report, an updated disclosure letter pertaining to a detective, and the resume of an expert) does not vitiate the original certificate. By any measure it was filed "in good faith" and was "reasonable under the circumstances."

(Citation omitted).

People v. Adrovic
69 Misc. 3d 563, 130 N.Y.S.3d 614
(N.Y. City Crim. Ct. 2020)

> This Court has difficulty understanding the reasoning in People v. Askin, cited by the People, which declined to follow the plain language of the statute and held that when the legislature said "all known materials," it didn't really mean "all known materials." In contrast, this Court finds that the literal language of the statute is controlling, and believes courts are bound to apply the laws as they are written.

(Citation omitted). See generally **People v. Barnett**, 68 Misc. 3d 1000, 129 N.Y.S.3d 293 (N.Y. Co. Sup. Ct. 2020) (prior to People's declaration of readiness, issue of validity of People's certificate of compliance is moot).

Illusory Certificate of Compliance a Nullity

People v. Adrovic
69 Misc. 3d 563, 130 N.Y.S.3d 614
(N.Y. City Crim. Ct. 2020)

> [W]here the prosecutor has failed to demonstrate diligence and reasonableness in obtaining and disclosing required information and, as a result of that lack of diligence and reasonableness has failed to make a necessary disclosure, then the Certificate of Compliance is invalid.
>
> Prejudice to the defendant is not a factor in this analysis; the People's obligation to provide discovery, and to certify compliance with that obligation, is not relieved by an absence of prejudice to the defendant. . . . When the People submit documentation to the Court certifying their compliance with their statutory obligation, they must do more than merely mouth the words. Because a "proper" certificate of compliance -- that is, one filed in good faith asserting that the prosecution has exercised the necessary due diligence in complying with their obligations -- is now a prerequisite before the People may legally be deemed ready for trial, previous case law holding that discovery failures do not impact the People's readiness have now been abrogated by statute and are no longer controlling.
>
> Here, the People served a Certificate of Compliance without having disclosed the necessary laboratory reports. Additionally, the People had not turned over police officer memo books, names and affiliations as required by the statute. Nor had they exercised the necessary due diligence to do so. * * *
>
> For these reasons, the Court rejects the January 28 Certificate.

(Citation omitted).

Retroactivity of CPL Article 245

People v. Villamar
69 Misc. 3d 842, 132 N.Y.S.3d 593
(N.Y. City Crim. Ct. 2020)

> Article 245 applies to all cases, including those cases pending on its effective date of January 1, 2020. * * *
>
> Additionally, and of great importance here, the newly enacted provisions of the CPL also require that the People comply with all discovery obligations outlined in section 245.20 as a prerequisite to their filing of a valid statement of readiness.

See also **People v. Roland**, 67 Misc. 3d 330, 121 N.Y.S.3d 550 (N.Y. City Crim. Ct. 2020); **People v. Berkowitz**, 2020 WL 5508068 (N.Y. City Crim. Ct. 2020); **People v. Rambally**, 2020 WL 4779547 (Nassau Co. Dist. Ct. 2020).

Retroactivity of CPL § 30.30(1)(e)

People v. Galindo

70 Misc. 3d 16, 127 N.Y.S.3d 223
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

> While the misdemeanor charges clearly must be dismissed, it had been the case, when defendant's dismissal motion was decided on July 27, 2015, that "CPL 30.30 does not apply to traffic infractions." However, on January 1, 2020, an amended CPL 30.30 statute went into effect that abrogated the case law on this point, and explicitly brought traffic infractions within its ambit. * * *
>
> [T]he question of first impression we now must answer is whether, for this direct appeal, we must follow the prior statute, in effect at the time of defendant's conviction, under which the traffic infractions could not be dismissed, or the current, amended CPL 30.30 statute, requiring dismissal of the traffic infractions along with the misdemeanors. * * *
>
> [T]he case law more on point with the instant matter supports retroactive application of the amended CPL 30.30 statute on this direct appeal. We therefore hold that the amended statute must be followed.

(Citations omitted). See also **People v. McKiernan**, 70 Misc. 3d 79, ___, 138 N.Y.S.3d 797, 800 (App. Term, 9th & 10th Jud. Dist. 2020) ("We agree with the reasoning and result of Galindo with respect to the retroactive effect of CPL 30.30(1)(e)").

People v. Ali

71 Misc. 3d 25, 145 N.Y.S.3d 273
(App. Term, 1st Dep't 2021)
(per curiam)

> We acknowledge that the Appellate Term, Second Department has concluded that CPL 30.30(1)(e) should be given retroactive application. For the reasons stated above, we decline to follow those decisions.

(Citations omitted).

CPL § 30.30 Claim Now Survives Guilty Plea

Prior to January 1, 2020, the rule was that a statutory speedy trial claim is waived/forfeited by a guilty plea. See, e.g., **People v. Konieczny**, 2 N.Y.3d 569, 575, 780 N.Y.S.2d 546, 550 (2004). Effective January 1, 2020, CPL § 30.30(6) provides that:

> An order finally denying a motion to dismiss pursuant to [CPL § 30.30(1)] shall be reviewable upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.

People v. McKiernan

70 Misc. 3d 79, 138 N.Y.S.3d 797
(App. Term, 9th & 10th Jud. Dist. 2020)

> The Appellate Term for the Second, Eleventh and Thirteenth Judicial Districts recently held that another subsection of the amended CPL 30.30 statute applies retroactively to permit dismissals of traffic infractions based on speedy trial grounds. We agree with the reasoning and result of Galindo with respect to the retroactive effect of CPL 30.30(2)(e), and we extend that reasoning to the retroactivity of CPL 30.30(6). In so holding, we note that, although defendant's conviction was entered prior to the enactment of the amended statute, "[t]raditional common-law methodology contemplates that cases on direct appeal will generally be decided in accordance with the law as it exists at the time the appellate decision is made."

(Citations omitted).

CPL § 30.30 -- *Sibblies* Issue

People v. Galindo
70 Misc. 3d 16, 127 N.Y.S.3d 223
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

> In People v. Brown, which was not decided until after defendant had been convicted and sentenced, the Court of Appeals explained that the People "must establish a valid reason for their unreadiness in response to a defendant's CPL 30.30 motion," because it always has been the People's ultimate "obligation in the postreadiness context to ensure 'that the record explains the cause of adjournments sufficiently for the court to determine which party should properly be charged with any delay.'" Because the People did not satisfy this requirement either on the record or by responding to defendant's motion, the Criminal Court should have deemed the CoR illusory and charged the entire adjournment period from December 1, 2014 to February 11, 2015 to the People.

(Citations omitted).

Length of Traffic Stop Must Be Reasonable

People v. Cooper
2021 WL 3235351
(App. Term, 9th & 10th Jud. Dist. 2021)

At the [Dunaway/Huntley/Mapp] hearing, the arresting officer, Trooper Lavarnway, testified that, while on vehicular patrol at approximately 2:20 a.m. on October 7, 2018, he and his partner, Trooper Winkelman, observed [2] vehicles driving slowly together. The license plate light of [1] of the vehicles was defective, and the troopers effected a traffic stop of that vehicle. However, both vehicles pulled over. Trooper Lavarnway approached the vehicle with the defective light, and Trooper Winkelman approached the second vehicle, driven by defendant. As Trooper Lavarnway conversed with the driver of the offending vehicle, Trooper Winkelman flashed a sign that Trooper Lavarnway understood to mean that defendant appeared intoxicated. Trooper Lavarnway testified that, based solely on his partner's hand gesture, and without having yet observed defendant, he already knew that he would be investigating whether defendant was driving while intoxicated, and he stated that defendant was not free to leave. * * *

Because defendant stopped his vehicle along with the offending vehicle, the troopers were permitted to approach and inquire, "[i]n light of the heightened dangers faced by investigating police officers during traffic stops." Soon after arriving at defendant's vehicle, Trooper Winkelman communicated a sign that Trooper Lavarnway unequivocally understood to mean that defendant may be intoxicated. Thus, Trooper Winkelman "acquired founded suspicion [that criminal activity was afoot] before the initial justification for detaining defendant had been exhausted," and the short delay before Trooper Lavarnway could join him at defendant's vehicle did not render the seizure unlawful.

(Citations omitted).

***Sandoval/Ventimiglia/Molineux* Issues**

People v. Khan
2020 WL 1977125
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

> [W]e find that the cumulative effect of the prosecutor's repeated improper references during cross-examination and in his summation to the fact that [2] people had gone to the hospital as a result of defendant's unrelated motor vehicle accident in 2008, which fact was not in evidence at trial, and to defendant's attitude with respect to this supposed fact, to which comments defense counsel objected, deprived defendant of his right to a fair trial.

People v. Ahluwalia
184 A.D.3d 540, 125 N.Y.S.3d 416
(1st Dep't 2020)

> The court's Sandoval ruling balanced the appropriate factors and was a proper exercise of discretion. Also, because the prior convictions raised the present [DWI] charge to a felony, and because defendant refused to admit to those convictions outside the jury's presence (see CPL 200.60[3][b]), those convictions were placed in evidence as part of the People's case. In addition, the People had a good faith basis for inquiring into whether defendant had previously asserted false medical excuses for refusing intoxication tests. That matter was probative of defendant's credibility, because he made similar medical claims in connection with the present arrest.

(Citation omitted).

People v. Wisniewski
191 A.D.3d 1435, 142 N.Y.S.3d 260
(4th Dep't 2021)

> Defendant . . . contends that the court erred in allowing the codefendant to testify on redirect examination by the People that there had been prior occasions in which the codefendant purchased marihuana from defendant's son while defendant was present. By objecting solely on the ground that the testimony lacked relevance, defendant failed to preserve his contention that such testimony should have been precluded under People v. Molineux. In any event, defendant opened the door to that testimony by eliciting testimony on cross-examination regarding those marihuana purchases and, contrary to defendant's contention, the testimony in question was relevant to establish why the codefendant was at defendant's home on the evening before the victim's death, to establish the nature of the relationship between defendant and the codefendant, and to complete the narrative of events leading up to the victim's death.

(Citations omitted).

Can People Introduce Breath Test Result Printout Into Evidence On Re-Direct Examination of Breath Technician?

People v. Graseck
2021 WL 2908599
(App. Term, 9th & 10th Jud. Dist. 2021)

> Defendant . . . challenges the judgment convicting him of violating [VTL] § 1192(2) and (3), contending that the trial court committed reversible error by allowing the prosecution to introduce a chemical breath analysis report into evidence on the redirect examination of a breath technician.
>
> Generally, the scope of redirect examination is governed by the sound discretion of the trial court. A court is not prevented from admitting evidence on redirect examination that would have been better proffered upon direct examination. * * *
>
> As the People had established a sufficient foundation on direct examination for the admissibility of defendant's BAC test results, i.e., an Intoxilyzer 9000 printout, we find that it was not an improvident exercise of its discretion for the Justice Court to have allowed the prosecution to introduce the printout into evidence on the redirect examination of the breath technician.

(Citation omitted).

Ineffective Assistance of Counsel

People v. Chamberlain

2021 WL 2559566
(App. Term, 9th & 10th Jud. Dist. 2021)

The sole contention defendant raises on appeal is that, under New York law, she was denied the effective assistance of counsel.

Defendant's trial attorney's failure to move to suppress evidence of defendant's refusal to take a chemical breath test did not amount to ineffective assistance since "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to make a motion . . . that has little or no chance of success." Evidence of defendant's ultimate refusal to take a chemical breath test after being afforded [2] opportunities to talk to her attorney before deciding whether to take the test was admissible to show consciousness of guilt, and the District Court provided the jury with a limiting instruction on this point.

With respect to the evidence presented of defendant's [2] attempts to take a [PBT] at the scene, for which there were no results because defendant provided insufficient breath samples, it is well settled that, while evidence of a PBT is not admissible as proof of intoxication, evidence of a defendant's failure to properly take a PBT can be admitted to show consciousness of guilt, "particularly in light of [a] trial court's limiting instructions to the jury on this point." Here, however, the District Court provided the jury with a limiting instruction as to consciousness of guilt in regard only to defendant's repeated refusal to take a postarrest chemical breath test, not the [2] PBTs. Nevertheless, defendant's trial attorney's error in failing to [request such an instruction] "was not so serious as to compromise defendant's right to a fair trial and did not constitute ineffective assistance."

(Citations omitted).

Applicability of New Discovery Statute to CPL § 30.30

People v. Quinlan
71 Misc. 3d 266, 142 N.Y.S.3d 305
(N.Y. City Crim. Ct. 2021)

> With regard to the time period of January 1, 2020, to January 15, 2020, the People argue that this 15-day period is excludable from a 30.30 computation as a reasonable amount of time to comply with their initial, automatic discovery obligations under CPL 245.10[1][a]. As previously stated, the People did not communicate readiness for trial prior to January 15, 2020, and the People could not have because they were still unconverted. While lower courts have split on the issue of whether the time period of January 1, 2020, when the criminal justice revisions took effect, to January 15, 2020, is chargeable to the People, this Court agrees with other lower courts that have held that this period is indeed chargeable to the People, and hereby rejects the People's argument. Neither CPL 30.30 nor Article 245 provide a grace period that tolls the speedy-trial clock for 15 days for the People to comply with their initial, automatic discovery obligations. Furthermore, this Court is convinced that if it was the intention of the legislature to do so, it would have. Clearly, the People's trial readiness is now directly tied to meeting their discovery obligations, "such that discovery compliance is a condition precedent to a valid announcement of readiness for trial."

(Citations and footnote omitted).

Disclosure of Information That Would Impeach Credibility of Police Officer

People v. Davis
67 Misc. 3d 391, 120 N.Y.S.3d 740
(N.Y. City Crim. Ct. 2020)

> The defendant is charged with [DWI] and other related charges. The primary issue presented in this case is whether the People are required to ask for an unsealing order from the Court to obtain Brady/Giglio materials from an unrelated and sealed criminal case in order to satisfy their constitutional and statutory obligation.
>
> After a careful consideration, the Court concludes that the People's Brady/Giglio obligation was fully discharged by the disclosure of the information within their possession and they are under no constitutional or statutory obligation to obtain an unsealing order from the Court. At the same time, in light of the recent Court of Appeals decision in People v. Rouse that underscores the importance of safeguarding the defendant's right to cross examine the witnesses about their prior incredible testimony, the Court orders unsealing in the interest of justice to conduct an *in camera* inspection of the evidence in the sealed case.

(Citations omitted). See also **People v. Davis**, 70 Misc. 3d 467, 134 N.Y.S.3d 620 (N.Y. City Crim. Ct. 2020) ("Having carefully reconsidered the issues presented herein in light of the repeal of Civil Rights Law § 50-a, the Court once again rejects the defendant's motion").

Matter of Certain Police Officers to Quash a So-Ordered Subpoena Duces Tecum

67 Misc. 3d 458, 121 N.Y.S.3d 535
(Westchester Co. Ct. 2020)

The Court directed police witnesses to answer the following questions put to them by the DA's Office to comply with CPL § 245.20(1)(k):

"(1) Has the witness been convicted of a crime? (2) Is the witness aware of any pending criminal charge? (3) Is the witness aware of a finding/ruling by a Court about the truthfulness of the testimony of the witness? (4) Is the witness aware of any civil lawsuit filed concerning the conduct of the witness in this case? (5) Is the witness aware of any civil lawsuit about the conduct of the witness in a past case? (6) Is the witness aware of any other administrative, personnel or civilian complaints implicating the witness's honesty and integrity?"

People v. Randolph

69 Misc. 3d 770, 132 N.Y.S.3d 726
(Suffolk Co. Sup. Ct. 2020)

[T]he People argue that CPL article 245 does not require the People to obtain or produce unrelated Suffolk County Police Department Internal Affairs Bureau (IAB) files on police witnesses. * * *

The question presented for the Court is considered against the background of the recent repeal of Civil Rights Law § 50-a effective June 12, 2020, which eliminated any claim of confidentiality in IAB files. * * *

As the People note, a[n] [IAB] case is "substantiated" where it is determined that the facts clearly support the allegation, "unsubstantiated" when the allegation cannot be resolved because sufficient evidence is not available, "exonerated" where the act was legal, proper and necessary and "unfounded" when there evidence establish that the act did not occur. Therefore, in cases involving exonerated and unfounded allegations, there is no good faith basis for cross examination by the defendant's counsel and as such it is not evidence or information that tends to or has an inclination to impeach a police witness. Consequently, IAB files involving allegations that have been determined to be exonerated or unfound[ed] are not required to

be provided as part of automatic discovery.

As to information required to be produced in substantiated and unsubstantiated IAB files, the issue of utilization of this material for impeachment must be determined by the hearing/trial judge, based, inter alia, on the good faith basis for cross-examination relevant to the credibility of the witness. The People thus may seek an [in] limine ruling to preclude any cross examination where the nature of the conduct or the circumstances in which it occurred does not bear logically and reasonably on the witness's credibility or there is no good faith basis for the inquiry. * * *

The People must provide any available IAB files, in any form, involving any witness that they intend in good faith to call at a hearing and/or trial to the defendant involving substantiated or unsubstantiated allegations.

(Citations omitted).

People v. Suprenant
69 Misc. 3d 685, 130 N.Y.S.3d 633
(Glens Falls City Ct. 2020)

[T]he People have met their obligations under 245.20(1)(k)(iv) by disclosing the existence of disciplinary records of [2] officers, and by causing the officers' disciplinary records to be disclosed to defense counsel by having the Glens Falls Police Department make copies available to defense counsel upon a request, either in writing or by phone. Contrary to the defendant's assertion, the fact that Civil Rights Law § 50-a has been repealed does not mandate an opposite decision. The repeal of Civil Rights Law § 50-a has made certain officer personnel records equally accessible by prosecutors and defense counsel, subject only to redaction in accordance with the Public Officers Law §§ 86, 87 and 89.

(Citation omitted).

People v. Lustig
68 Misc. 3d 234, 123 N.Y.S.3d 469
(Queens Co. Sup. Ct. 2020)

The People are aware of the federal lawsuit's existence, which, of course, is why they disclosed it to the defense. The only question, then, is whether the People must take the additional step of providing to the defense the various filings related to the lawsuit. The Court concludes that they do not.

People v. Knight
69 Misc. 3d 546, 130 N.Y.S.3d 919
(Kings Co. Sup. Ct. 2020)

With respect to the People's disclosure of instances of alleged misconduct by their potential police witnesses, the People satisfied their obligations under CPL § 245.20(1)(k)(iv) with the disclosure letters they provided.

People v. Gonzalez
2020 WL 4873901
(Kings Co. Sup. Ct. 2020)

[T]he court agrees with the People that their disclosure regarding a potential witness -- [2] substantiated allegations and [1] pending allegation of misconduct unrelated to the subject matter of the case but arguably of impeachment value -- satisfies their obligations under CPL § 245.20[1][k][iv]. The court rejects defendant's claim that the prosecution must produce underlying records in addition to these disclosures.

Facial Sufficiency Issues -- Generally

People v. Gottwald
2020 WL 5775535
(App. Term, 1st Dep't 2020)
(per curiam)

> The misdemeanor information charging defendant with driving while impaired was not jurisdictionally defective. The arresting officer alleged that, on a specified date, time and street location, defendant operated a 2003 Honda motor vehicle, had bloodshot and watery eyes, the odor of alcohol on his breath, was unsteady on his feet and refused to submit to a breath test. These allegations gave defendant sufficient notice to prepare a defense and had detail adequate to prevent him from being tried twice for the same offense. There was no requirement that the information also contain an allegation of erratic driving.

(Citations omitted). See also **People v. Cadogan**, 2020 WL 2544791 (App. Term, 1st Dep't 2020) (per curiam) ("The accusatory instrument was not jurisdictionally defective. Sworn police allegations that "the engine was running and defendant was behind the wheel on a public street" satisfied the operation element of the charged [VTL] offenses"); **People v. Fiumara**, 116 A.D.3d 421, 982 N.Y.S.2d 482 (1st Dep't 2014).

Facial Sufficiency Issues

Public Highway Not Properly Alleged

People v. Moreno
70 Misc. 3d 10, 135 N.Y.S.3d 560
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

> [T]he accusatory instrument [to the VTL § 1227(1) charge] failed to sufficiently allege that the prohibited conduct occurred on a public highway since it merely stated an address at which defendant's motor vehicle was located, with defendant asleep within the vehicle, without providing any further details. While an inference can be drawn that the vehicle was located on a public street, it is equally possible that the vehicle was parked in a private driveway or small private lot that was located at that address. Consequently, as the accusatory instrument failed to sufficiently allege that the vehicle that defendant was found asleep in was located on a public highway, the count charging defendant with violating [VTL] § 1227(1) was facially insufficient.

(Citation omitted). See also **People v. McNamara**, 78 N.Y.2d 626, 578 N.Y.S.2d 476 (1991) ("That the information referred to '291 15th Street' does not cure this deficiency; as respondent points out, the address could as readily refer to a private driveway as to a residential street").

Facial Sufficiency Issues

Operation Not Properly Alleged

People v. Moreno
70 Misc. 3d 10, 135 N.Y.S.3d 560
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

> [T]he accusatory instrument [to the DWAI charge] lacked any facts alleging that defendant had operated the motor vehicle that he was found asleep in or even that he had been in the driver's seat of the vehicle because he had intended on driving it. For example, it did not allege that the keys were in the ignition or that the engine was running or that any circumstances existed that would imply that the vehicle had recently been driven or even turned on. Consequently, as the accusatory instrument failed to allege that defendant had operated a motor vehicle while his ability to do so was impaired by alcohol, this count in the accusatory instrument was facially insufficient.

(Citations omitted).

Facial Sufficiency Issues

Operation Properly Alleged

People v. Iglesia
2020 WL 6278740
(App. Term, 1st Dep't 2020)
(per curiam)

> [T]he accusatory instrument was jurisdictionally valid, since it provided reasonable cause to believe that defendant was guilty of [DWAI], the offense to which he ultimately pleaded guilty. The operation element of the offense was satisfied by allegations [in the misdemeanor complaint] that defendant was observed "standing next to a white Ford Van," that defendant had the keys to the van in his pants pocket, the lights to the van were on, and that defendant stated that he hit a pole while driving.

(Citation omitted).

People's Readiness for Trial -- Valid Accusatory Instrument

People v. Sosa
2021 WL 2324921
(App. Term, 2d, 11th & 13th Jud. Dist. 2021)

> [D]efendant was arraigned on an accusatory instrument charging him with [DWI] per se and common-law [DWI], and the People announced that they were ready. . . . [T]he Criminal Court . . . granted the branch of defendant's motion seeking to dismiss on the ground that the accusatory instrument was facially insufficient, finding that the instrument did not contain factual allegations regarding the element of "operation" of the motor vehicle, but stayed dismissal for 30 days so that the People could file another accusatory instrument. . . . [T]he People [thereafter] filed a superseding information charging defendant with [DWI] per se and common law [DWI], and filed a statement of readiness. * * *
>
> Defendant argued, among other things, that since the original accusatory instrument had been found to be facially insufficient, the People's statements of readiness were illusory, and, thus, more than 90 days of delay were chargeable to the People. * * *
>
> A statement of readiness is "presumed truthful and accurate," and the defendant has the burden to "demonstrate that it is illusory by showing that the People were not actually ready at the time they filed it." However, if "the original accusatory instrument was jurisdictionally defective, any statement of readiness made by the People was illusory because the People could not validly declare themselves ready until there was an accusatory instrument sufficient for trial." [However,] [e]ven though the People cannot properly announce ready on a defective accusatory instrument, time periods which would otherwise be excludable pursuant to CPL 30.30(4) remain excludable when calculating speedy trial time.

(Citations omitted).

Stop Based on Tip from "Identified Citizen"

People v. Haga
2021 WL 2908607
(App. Term, 9th & 10th Jud. Dist. 2021)

> An identified citizen informant is presumed to be reliable. Here, not only did the informant identify himself as defendant's husband, but he provided explicit details about defendant and the vehicle that she was driving, including its make, color, year, and the fact that it had a flat tire. Moreover, the arresting officer testified that the vehicle was stopped in close proximity to where it was reported to have been and within 20 minutes after the 911 call had been made. Thus, the officer who had stopped defendant's vehicle was entitled to rely on the information provided by defendant's husband to the police, which was relayed by the dispatcher, and to assume its reliability in providing probable cause, or, at the very least, reasonable suspicion to stop defendant's vehicle.
>
> Contrary to defendant's contention, it was not necessary for the People to have produced at the hearing the officer who had stopped her vehicle. As hearsay is admissible to establish any material fact at a hearing on a motion to suppress evidence, and information conveyed to an officer by a fellow officer is presumptively reliable, where the testifying officer at a suppression hearing establishes that information had been conveyed to him or her by a non-testifying fellow officer, the conveyed information may properly contribute to establish probable cause or reasonable suspicion. Consequently, even though the arresting officer neither witnessed defendant driving nor conducted the traffic stop, the District Court properly determined that the vehicle stop was lawful.

(Citations omitted). See also **People v. Kraten**, 2021 WL 2410203 (Webster Just. Ct. 2021).

Probable Cause to Approach/Stop -- Generally

People v. Castaneda
2020 WL 3424542
(App. Term, 1st Dep't 2020)
(per curiam)

> The record supports the court's finding that based on the totality of the circumstances, the encounter was a nonforcible approach to an already stopped vehicle, rather than a seizure, requiring only an objective, credible reason, for which there was ample basis. The credited testimony established that defendant's vehicle sped past a security checkpoint outside a restricted "Authorized Vehicles Only" entrance to the Port Authority Bus Terminal, disregarding a Port Authority police officer who screamed and waived at defendant to stop, and then pulled into a bus loading zone and then stopped on its own. In any event, to the extent that the reasonable suspicion standard applies, the court properly found that the officer had reasonable suspicion as well.

(Citations omitted).

Matter of McCaul v. New York State Dep't of Motor Vehicles
179 A.D.3d 803, 117 N.Y.S.3d 692
(2d Dep't 2020)

> Contrary to the petitioner's contention, substantial evidence supports a finding that the lieutenant who first encountered the petitioner, whether acting in the performance of his public service function or in the performance of his role as an agent of law enforcement, was justified in approaching the petitioner's vehicle, upon observing the petitioner slumped over in the driver's seat of the vehicle, and in opening the unlocked driver's side door, when the petitioner did not respond to several attempts to awaken him by knocking on the window.

See also **People v. McCaul**, 2021 WL 1096479 (App. Term, 9th & 10th Jud. Dist. 2021) (same result in the defendant's DWI case).

People v. Graham
2020 WL 7414172
(App. Term, 9th & 10th Jud. Dist. 2020)

> A Dunaway/Huntley hearing was held in which the arresting deputy was the sole witness. He testified that he was on patrol in the early morning hours of May 6, 2018 when, at approximately 2:13 a.m., he saw a vehicle parked on the side of the road "with its [4] way or its hazard lights on." The deputy radioed to his station that he was investigating a "suspicious vehicle," turned on his turret lights and parked his patrol car behind the vehicle. He saw defendant, who was alone, standing and urinating beside the vehicle. * * *
>
> Following the hearing, the Justice Court granted the branch of defendant's motion seeking suppression of all observational, physical and statement evidence. The court explained that the deputy's approach of the vehicle was unconstitutional as his subjective reason for doing so -- that it was "suspicious" -- was contradicted by his acknowledgment that, in fact, the vehicle had been parked properly and lawfully, and the deputy had observed no other illegality. . . . The People appeal, and we reverse.
>
> "[S]tops based on considerations of public safety are warranted even where an actual violation of the [VTL] [is] not . . . detectable." Similar to the scenario in People v. Heston, in which the officer approached a "car, which was parked with its dome light on, to see if there was a problem or if its occupants were all right," the deputy's observations in the instant case of defendant's vehicle parked on the shoulder of the road with its hazard lights blinking at 2:13 in the morning was "a sufficient basis to justify the approach and inquiry."

(Citations omitted). See also **People v. Grays**, 179 A.D.3d 1149, 114 N.Y.S.3d 531 (3d Dep't 2020).

Probable Cause to Stop -- Speeding

People v. Scott
189 A.D.3d 2110, 138 N.Y.S.3d 780
(4th Dep't 2020)

> [T]he police had probable cause to stop the vehicle that he was driving based upon his commission of a traffic violation, i.e., speeding. The officer who initiated the stop testified at the suppression hearing that he had training and experience in visually estimating the speed of vehicles, and further testified that he estimated defendant to be traveling 60 miles per hour on a street where the posted speed limit was 35 miles per hour. It is well settled "that opinion evidence with regard to the speed of moving vehicles is admissible provided that the witness who testifies first shows some experience in observing the rate of speed of moving objects or some other satisfactory reason or basis for his [or her] opinion." Based on the evidence at the suppression hearing, we conclude that the People met their burden of establishing that the officer's visual observations of the vehicle provided probable cause for the stop.

(Citations omitted).

Proof Beyond a Reasonable Doubt -- Speeding

People v. Enriquez
2020 WL 5884347
(App. Term, 9th & 10th Jud. Dist. 2020)

> [T]he evidence adduced at trial, viewed in the light most favorable to the People, failed to establish defendant's guilt of speeding beyond a reasonable doubt. A reading from an untested radar device, coupled with a qualified police officer's visual estimate of speed, suffices to prove the offense of speeding beyond a reasonable doubt. A qualified police officer's visual estimate, alone, is legally sufficient to support a conviction of speeding so long as "the variance between the estimated speed and maximum permissible speed is sufficiently wide so that [the factfinder] may be certain beyond a reasonable doubt that the defendant exceeded the permissible limit." In this case, while the arresting officer testified that he had "obtained a reading" from an untested radar device, he did not testify as to the rate of speed that the reading revealed. Moreover, although the arresting officer testified that he was qualified to visually estimate the speed of moving vehicles and that defendant was traveling at 65 [MPH] in a 50 [MPH] zone, the 15 [MPH] variance between the estimated speed of defendant's vehicle and the speed limit did not exceed the 20 [MPH] variance deemed "clearly sufficient" to support a speeding conviction based on a visual estimate, and it cannot be concluded that the totality of the evidence was legally sufficient to establish defendant's guilt of speeding beyond a reasonable doubt.

(Citations omitted).

Probable Cause to Arrest in VTL § 1192 Case

People v. Riley
2020 WL 6164667
(App. Term, 9th & 10th Jud. Dist. 2020)

> The District Court . . . found that, because of defendant's partially successful performance, his field sobriety test results did not constitute probable cause to believe that defendant was intoxicated. Because the officer determined that defendant was intoxicated based upon the field sobriety test results, the court held that probable cause was absent from defendant's arrest and consequently granted defendant's motion to suppress the evidence obtained subsequent to his arrest, including defendant's refusal to submit to chemical testing of his breath to determine its blood alcohol content.
>
> The court's reliance on the officer's subjective opinions was in error. "The assessment of whether there was probable cause for the arrest of an individual is to be made . . . upon consideration of all the relevant objective facts known to the officer; the subjective beliefs of the officer do not control the determination." Here, the evidence of defendant's intoxication -- i.e., the traffic violation; defendant's bloodshot eyes, slurred speech and the odor of alcohol on his breath; and the presence of a partially consumed bottle of Hennessy on the back seat of the car -- objectively provided the officer with probable cause to arrest defendant for driving while impaired, if not intoxicated driving. "Therefore, the circumstances before and after the stop, as established by the credited hearing testimony, and when viewed objectively, constituted probable cause for arresting defendant for driving while intoxicated, or, at the very least, for the closely related offense of driving while ability impaired."

(Citations omitted).

People v. Crandall
181 A.D.3d 1091, 120 N.Y.S.3d 522
(3d Dep't 2020)

> [A] sergeant with the Hamilton County Sheriff's Department came upon the scene of a single-vehicle accident and encountered defendant standing alone by the side of the road. Defendant emitted a strong odor of alcohol, and the sergeant observed that defendant was unsteady on his feet and had bloodshot eyes, impaired motor coordination and slurred speech. When asked how much he had to drink that evening, defendant clutched his chest, professed to be experiencing chest pains and was transported to a local hospital. As a result, no field sobriety tests were performed; defendant refused to submit to chemical testing at the hospital, and he deferred a request by medical personnel for a blood draw. * * *
>
> The sergeant's testimony regarding his observations at the accident scene and his direct interaction with defendant, including his statement that defendant, who admittedly was driving the vehicle involved in the accident, smelled strongly of alcohol, was unsteady on his feet, exhibited impaired motor skills and was slurring his words, was sufficient to support a reasonable belief that defendant was driving while intoxicated. Contrary to defendant's assertion, "the fact that [he] did not submit to field sobriety testing at the scene is not fatal to a finding of probable cause to arrest [him] for driving while intoxicated."

(Citations omitted).

Probable Cause to Arrest -- Proof of Operation

People v. Collins
2020 WL 7220615
(Rochester City Ct. 2020)

> Defendant acknowledges that Officer Davidson testified that he saw the driver removed from the crashed vehicle and placed on the ambulance gurney. He points out, though, that there was no testimony that Officer Davidson spoke with Officer Weech [*i.e.*, the arresting officer] about his observations. * * *
>
> Defendant is correct that . . . the People presented no direct evidence regarding how Officer Weech learned that defendant was the crashed vehicle's driver. Nonetheless, . . . it is legally proper for the Court to infer Officer Weech's knowledge of defendant's identity as the driver from the circumstantial evidence presented at the hearing.
>
> In People v. Ramirez-Portoreal, the Court of Appeals affirmed that the People are entitled to rely on circumstantial evidence to show that a police officer communicated to an arresting police officer the information necessary to establish probable cause to arrest a defendant. In other words, according to the Ramirez-Portoreal Court, a "suppression court . . . is not precluded from drawing the inference from . . . circumstantial evidence that [one police officer] conveyed his information to [the arresting police officer]." * * *
>
> As in People v. Ramirez-Portoreal, the circumstantial hearing evidence in this case is sufficient to permit the Court to infer that before Officer Weech arrested defendant for [DWI], either Officer Davidson or Officer Brongo told him that defendant was the crashed vehicle's driver.

(Citations omitted).

Proof That Defendant Intended to Operate Vehicle Not Required at Probable Cause Hearing

People v. Kaster
2020 WL 6165157
(App. Term, 9th & 10th Jud. Dist. 2020)

> Defendant testified at the [suppression] hearing that he had become intoxicated while at a nearby nightclub. Since he was unsuccessful reaching a friend by phone to pick him up, he slept in the driver's seat of his vehicle. He kept the driver's side door open because he was feeling sick, but as it was a cold February night, he started his vehicle so as to turn on the heat. Defendant testified that he neither drove, nor attempted to drive, his vehicle while he was intoxicated.
>
> The City Court found that, although the deputy "had [a] reasonable basis" to investigate the defendant's vehicle, "and had developed more than sufficient information to determine that [defendant] was intoxicated, . . . the People have failed to present sufficient evidence to establish probable cause . . . to establish operation and justify the arrest for [DWI]." Consequently, the court granted the branch of defendant's motion seeking to suppress the result of the postarrest chemical test of defendant's breath and statement attributed to him. * * *
>
> Contrary to defendant's contention at the hearing, "'[a]n established line of authority in New York and elsewhere holds that for purposes of offenses for [DWI] under the [VTL], operation of the vehicle is established on 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.'" In view of the foregoing, "the police clearly had probable cause to arrest defendant."

(Citations omitted).

Operation While Sleeping

People v. Allaico
2021 WL 219615
(App. Term, 2d, 11th & 13th Jud. Dist. 2021)

> At trial, a police officer testified that, at about 12:50 a.m., he discovered defendant asleep in the driver's seat of a vehicle parked in a parking lot in Flushing Meadows Park which had closed at 9:00 p.m. The vehicle's engine was running and its headlights were on. The officer observed an odor of an alcoholic beverage emanating from defendant, who had watery eyes, slurred speech and was unsteady on his feet. The officer asked defendant for his driver's license, which defendant did not provide, and defendant admitted to having consumed [2] beers. After being provided with his Miranda rights, defendant admitted that he had driven "from home" and that he had consumed [4] Coronas. The result of defendant's Intoxilyzer test indicated that his blood alcohol content was .148%. * * *
>
> The evidence demonstrated that defendant was intoxicated and failed to provide the police officer with his driver's license when asked, which facts defendant does not dispute. The evidence that the officer had discovered defendant asleep in the driver's seat of a parked vehicle with the engine running and its headlights on was sufficient to establish that defendant operated the vehicle.

See also **People v. General**, 2020 WL 1860077 (App. Term, 2d, 11th & 13th Jud. Dist. 2020); **People v. Fasano**, 2020 WL 939301 (App. Term, 9th & 10th Jud. Dist. 2020).

Operation While Engaged in Romantic Encounter

People v. Miley
69 Misc. 3d 215, 126 N.Y.S.3d 354
(Long Beach City Ct. 2020)

In his motion papers, defense counsel relies heavily upon a theory that proof of the defendant's intent to put the vehicle in motion is lacking. To that end, counsel paints a vivid picture of the circumstances that led to the defendant's arrest. Specifically, counsel tells a tale of a young couple having a romantic interlude in a legally parked vehicle with the engine running which was ultimately interrupted by the Long Beach Police. As suggested by counsel in his motion papers, the defendant had no intention of putting the vehicle in motion "any time soon" because she was "intent upon the 'commission' of much more romantic things instead!" The court appreciates counsel's ability to convey through words the story of a perfect evening gone awry. In fact, as a longtime resident and avid historian of the City of Long Beach, the court has fond memories of many of our city's more tranquil and scenic locations to park a vehicle to enjoy the evening ambience that our city has to offer, including the location at issue here. Nevertheless, the entire universe of factual allegations is not available for the court's consideration on the instant motion. At this phase, where the court is merely examining the sufficiency of the accusatory instrument, the court's analysis is confined solely to the allegations contained in the simplified traffic information and the supporting deposition.

Moreover, at this stage of the proceedings, the People are not required to prove operation (or even more specifically, the defendant's intent to put the vehicle in motion) beyond a reasonable doubt. In fact, at this stage, the People are not required to "prove" operation at all.

(Citation omitted).

Inevitable Discovery Doctrine

People v. Hayden-Larson
179 A.D.3d 1549, 118 N.Y.S.3d 880
(4th Dep't 2020)

> We agree with defendant . . . that the court erred in refusing to suppress the evidence obtained from the diabetes bag pursuant to the inevitable discovery doctrine. The contents of the diabetes bag that defendant sought to suppress was the 'very evidence' that was obtained as the 'immediate consequence of the challenged police conduct,' and thus the inevitable discovery doctrine is not applicable here."

(Citations omitted).

Failure to Provide Spanish Interpreter at Roadside

People v. Ortega-Flores
70 Misc. 3d 60, 125 N.Y.S.3d 219
(App. Term, 9th & 10th Jud. Dist. 2020)

> Defendant's alternate contention -- that his noticed statements and refusal were not voluntary because the trooper spoke with him in English only, despite his lack of proficiency in the language -- is also without merit. Contrary to defendant's assertion on appeal, the fact that he was a Mexican national, and that Spanish may have been his first language, does not, in and of itself, constitute a valid presumption that he could not speak or understand English sufficiently when conversing with the trooper. The phraseology of defendant's noticed statement, "No, no. I don't drink nothing; my friends were drinking," while grammatically incorrect, demonstrated both defendant's understanding of the English-spoken question that elicited the response, and his ability to respond intelligibly and understandably in English. Finally, the trooper's partner's use of one Spanish word, which was unsolicited by defendant, does not allow for the reasonable inference that defendant's overall understanding of the English language was deficient either. Quite the opposite, defendant appeared to understand the trooper's various questions, all asked in English, and he responded in kind. Defendant never "stated that his understanding of English was limited," requested an interpreter or translation at that time, or otherwise demonstrated that "his English language comprehension was so deficient that he could not understand the import of his rights."

(Citations omitted).

Sufficiency of *Peque* Warning

People v. Tagiev

70 Misc. 3d 47, 137 N.Y.S.3d 242
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

> Assuming that a trial court even has a duty to provide a Peque warning when a defendant is pleading guilty to a misdemeanor, the court fulfilled whatever duty it may have had, as it was only required to "provide a short, straightforward statement on the record notifying the defendant that, in sum and substance, if the defendant is not a United States citizen, he or she may be deported upon a guilty plea."

(Citations omitted).

People v. Miranda

2020 WL 7866939
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

> Assuming that Peque even applies to misdemeanors, defendant failed to establish "the existence of a reasonable probability that," as a result of the Peque warning, he "would have rejected the plea and opted to go to trial," since the record demonstrates that defendant was advised of the potential deportation and immigration consequences before the court's acceptance of his plea.

(Citations omitted).

PBT Evidence

People v. Castro
2020 WL 3818268
(App. Term, 1st Dep't 2020)
(per curiam)

> With respect to the portable breath test [PBT] administered to defendant at the scene, the court found that the People had not presented sufficient evidence of the reliability of PBT results, but nevertheless permitted the arresting officer to testify that he administered a PBT to defendant that produced a "positive" result for alcohol for purposes of explaining police actions leading to defendant's arrest. Even assuming, without deciding, that admission of this testimony was improper, any error was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt.

(Citation omitted).

Expert Witness Evidence

People v. Castro
2020 WL 3818268
(App. Term, 1st Dep't 2020)
(per curiam)

> The trial court providently exercised its discretion in limiting the scope of the testimony of defendant's expert. The admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court. Here, defendant's expert, Dr. Joseph Anderson, an assistant professor in bioengineering with a degree in chemical engineering, was permitted to testify regarding how alcohol moves from one's blood and into one's breath, how the amount of air that a person can exhale can impact the results of a blood alcohol test and how medical conditions such as emphysema and asthma can lead to a falsely elevated breath alcohol concentration in an exhaled breath. However, based upon the fact that Dr. Anderson was not a medical doctor and had no expertise in asthma or alcohol breath tests, the trial court correctly concluded that he could not testify as an expert that a breath sample from an asthmatic person "will show" a higher level of alcohol concentration than a breath sample from a person without asthma, or stated differently, that the breath samples provided by every person with asthma are inaccurate.

(Citations omitted).

Chemical Test Refusal Issues

People v. Enriquez

2020 WL 5884347
(App. Term, 9th & 10th Jud. Dist. 2020)

> The . . . evidence established that defendant was clearly warned of the consequences of refusing to take the requested chemical test and afforded an adequate opportunity to seek the advice of counsel on whether to submit to that test. Furthermore, defendant was advised that she could not delay the administration of the test by constantly asking for an attorney, and, when informed that it would be the last time that she was going to be asked whether she would take a test, defendant shook her head, indicating a negative response. Thus, . . . we find that a reasonable motorist in defendant's position would have understood that, unlike the prior encounters, her third response to the officer's request would be interpreted by the officer as a binding refusal to submit to a chemical test. Consequently, the District Court properly ruled that evidence of defendant's refusal was admissible at trial.

(Citations omitted).

People v. Ampah

2020 WL 949880
(App. Term, 1st Dep't 2020)
(per curiam)

> The court . . . properly denied defendant's motion to suppress testimony of his refusal to take a breathalyzer test. The record supports the court's finding that defendant effectively refused the test by 'acting in an obstructionist manner' by refusing to give a 'yes or no' response to the officer's multiple requests that he take such test.

Matter of Deraway v. New York State Dep't of Motor Vehicles Appeals Bd.
181 A.D.3d 1150, 118 N.Y.S.3d 489
(4th Dep't 2020)

> The [ALJ] revoked petitioner's license after concluding, inter alia, that the traffic stop [for suspicion of violating VTL § 600(1)(a)] was legal. In affirming that determination on petitioner's administrative appeal, respondent concluded that the stop was lawful because the officer "had a reasonable basis for stopping" petitioner.
>
> We agree with petitioner that respondent reviewed the determination under an incorrect legal standard inasmuch as "the Court of Appeals has made it 'abundantly clear' . . . that 'police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime' . . .[,] or where the police have 'probable cause to believe that the driver . . . has committed a traffic violation.'" We further agree with petitioner that the record lacks substantial evidence to support the determination that the officer had the requisite probable cause at the time of the stop. We therefore annul the determination and grant the amended petition.

(Citations omitted).

Defects in Report of Refusal Are Nonjurisdictional

Matter of Nahum v. New York State Dep't of Motor Vehicles
185 A.D.3d 827, 125 N.Y.S.3d 289
(2d Dep't 2020)

> We . . . reject the petitioner's argument that purported defects in the written report of his refusal to submit to the chemical test deprived the New York State Department of Motor Vehicles of jurisdiction to conduct a hearing pursuant to [VTL] § 1194(2)(c). The requirements set forth in [VTL] § 1194(2)(b), as to the contents of a written report of refusal to submit to a chemical test, concern the temporary suspension of a driver license based on a motorist's refusal to submit to a chemical test, which happens automatically based upon the refusal, without a hearing. Those requirements do not implicate the jurisdiction of the New York State Department of Motor Vehicles to conduct a hearing pursuant to [VTL] § 1194(2)(b) and (c), to revoke a motorist's driver license, based on the motorist's refusal to submit to a chemical test.

Matter of Smith v. Appeals Bd. of Admin. Adjudication Bureau
68 Misc. 3d 970, 128 N.Y.S.3d 144
(Albany Co. Sup. Ct. 2020)

> [I]n this case, Trooper Ellinwood wholly failed to prepare a chemical test refusal report on the DMV's prescribed Form AA-134. But he did prepare a verified, simplified information and supporting deposition charging petitioner with operating a motor vehicle under the influence of alcohol that satisfied the requirements of [VTL] § 1194 and any due process concerns that may arise in the absence of a refusal report. . . . This documentation would have been sufficient for the arraignment judge to issue Form AA-137, Notice of Temporary Suspension and Notice of Hearing, triggering the refusal

hearing before DMV.

More importantly, at the refusal hearing, Trooper Ellinwood provided sworn testimony consistent with that documentation, which was subject to cross-examination. Trooper Ellinwood's testimony provided ample evidence to support the hearing officer's findings that petitioner was lawfully arrested; that he was intoxicated; and that he refused to submit to a chemical test despite explicit warnings of the consequences of a refusal, resulting in revocation. Indeed, petitioner does not challenge respondent's factual findings. To the extent that the revocation of a driver's license in the absence of a chemical test refusal report on the Form AA-134 prescribed by DMV might implicate due process concerns, such concerns are not present here, where the arresting officer provided sworn testimony addressing all the elements required by statute and regulations to support revocation.

(Citation and footnotes omitted).

Matter of Cartagena v. Egan
2019 WL 1674167
(N.Y. Co. Sup. Ct. 2019)

No controlling authority has imposed a requirement on the DMV that it produce proof of a correctly completed refusal report in order to acquire jurisdiction to revoke the petitioner's license at a hearing held pursuant to VTL § 1194(2)(c), and the court declines to impose such a requirement at present.

Chemical Tests and the Right to Counsel

People v. Butler
2020 WL 3528595
(App. Term, 1st Dep't 2020)
(per curiam)

While an individual charged with [DWI] has a right to consult with an attorney before deciding whether to submit to a chemical test, it is only a qualified right to counsel, not a constitutional one. To invoke this right, the request must be specific and unequivocal.

Here, the suppression court, which adopted the findings of fact and conclusions of law made by a judicial hearing officer, properly determined that defendant did not make a specific and unequivocal request to speak to an attorney before deciding to submit to the breathalyzer test that established a .157 blood alcohol content. The credited evidence, including the videotape of defendant's breathalyzer test, established that defendant, while "speaking incessantly" for nearly [30] minutes and mentioning that he had a lawyer, never requested to see or speak with his lawyer or any other lawyer regarding the decision to take the breath test, and repeated that he was not refusing to take a breathalyzer test.

Even assuming that defendant's statement "you can call my attorney all day" could be viewed as defendant making "a specific request for an attorney vis-a-vis th[e] decision" to submit to a chemical test, the officer responded "call your lawyer if you want." Defendant, however, never took the officer up on this offer nor made any further mention of his attorney. Thus, it cannot be said that police "prevent[ed] access between [defendant] and his lawyer" in connection with such decision. Accordingly, the motion to suppress the test results and defendant's subsequent statements was properly denied.

(Citations omitted).

Chain of Custody of Blood Sample

People v. Esposito
70 Misc. 3d 74, 138 N.Y.S.3d 794
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

> "The chain of custody of any blood sample must be established and the failure to do so may be excused only where the circumstances provide reasonable assurances of the identity and unchanged condition of the sample."
>
> Here, while there is a gap in the chain of custody between the point where the nurse delivered the vials to the hospital laboratory and when Police Officer Murphy obtained the vials pursuant to the warrant, the testimony presented by the People established circumstances providing reasonable assurances of the identity and unchanged condition of the [2] vials of defendant's blood that were received at the police laboratory and tested to determine defendant's blood alcohol level. Under the circumstances, any gaps in the chain of custody go to the weight of the evidence, not its admissibility. Consequently, the Criminal Court properly admitted the results of the blood alcohol test into evidence.

(Citations omitted).

Significance of "Insufficient" Breath Sample

People v. Kim
2020 WL 3424598
(App. Term, 1st Dep't 2020)
(per curiam)

> The trial court properly permitted the trained police officer who operated the Intoxilyzer device to testify that an "insufficient" instrument reading based on breath sample remains a valid measure of a subject's blood alcohol content, since such a reading typically understates the true blood alcohol content. Contrary to defendant's contention, "[t]his testimony amounted to reporting the results of the test, which, once a proper foundation had been laid, was permissible without expert testimony."

(Citations omitted).

Failure to Follow Department's Own Checkpoint Procedures

People v. Figueroa
2020 WL 5362173
(App. Term, 9th & 10th Jud. Dist. 2020)

> [T]he checkpoint was not rendered invalid by the fact that the operating officers were not required to ask each motorist passing the checkpoint to produce his or her driver's license or proof of insurance. Although the Rules and Procedures of the Suffolk County Police Department provides that "[s]creening officers shall . . . [a]sk each driver to produce his/her driver license and proof of insurance," the checkpoint commander sergeant explained that he had decided, in advance, not to follow that mandate because requiring each motorist to produce a driver's license and proof of insurance would unnecessarily impede traffic flow and slow down the operation of the checkpoint, which, according to the sergeant, was in conflict with the policy of the Rules and Procedures. Moreover, since there is no authority that expressly mandates the promulgation of written guidelines for the arrangement and use of a checkpoint, such as the Rules and Procedures involved herein, a deviation, if any, from the Rules and Procedures does not make the otherwise constitutional checkpoint unconstitutional.

(Citations omitted). See also **People v. Marconi**, 2020 WL 7414160 (App. Term, 9th & 10th Jud. Dist. 2020) ("'there is no authority that expressly mandates the promulgation of [written] guidelines' for the arrangement and use of a checkpoint") (citation omitted). Cf. **People v. Jones**, 185 A.D.3d 1159, 126 N.Y.S.3d 808 (3d Dep't 2020) ("Despite the reasonableness of the [Albany Police Department inventory search] policy, [Officer] Elliott's testimony reveals that he did not comply with it and, therefore, Supreme Court erred in denying defendant's suppression motion").

Statements -- Generally

People v. Sampson
184 A.D.3d 1123, 125 N.Y.S.3d 808
(4th Dep't 2020)

> Defendant contends that County Court erred in determining that the testimony of a State Trooper regarding statements made by the other occupants of the vehicle was admissible in evidence under the present sense impression and excited utterance exceptions to the rule against hearsay. Specifically, when the Trooper first approached the window of the vehicle, about 20 seconds after pulling it over, he observed defendant attempting to settle himself between [2] occupants of the vehicle who were sitting in the back seat, and the Trooper heard the other occupants of the vehicle spontaneously state, among other things, that defendant was the driver of the vehicle. Under those circumstances, the court properly admitted in evidence the spontaneous statements of the other occupants of the vehicle as excited utterances. The court also properly admitted those statements as present sense impressions, inasmuch as the statements described an unfolding situation and were independently verified by the Trooper's own observations. Defendant also contends that the admission in evidence of those statements violated his right to confront witnesses against him. We reject that contention because the spontaneous statements of the other occupants were not testimonial in nature.

(Citations omitted).

People v. Ramirez
2020 WL 7018556
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

> Defendant contends on appeal that the arresting officer's testimony that he spoke to a witness at the scene, without setting forth what that witness had said, nevertheless violated his rights under the Confrontation Clause and constituted inferential bolstering because that witness did not testify, arguing that the jury could infer from the context what the witness said. Defendant also argues that, by testifying about what another testifying witness had told him at the scene, the arresting officer improperly bolstered that witness's testimony with his prior consistent statements. * * *
>
> The arresting officer's testimony that he spoke to a witness at the scene was not likely, under the circumstances presented, to lead to any improper or prejudicial inferences. On the other hand, the officer's testimony repeating what another trial witness told him at the scene did constitute evidence of a prior consistent statement by another testifying witness, but there was no prejudice under the circumstances. We note that, even if inferential bolstering had occurred, we would find it to be harmless given the overwhelming evidence of defendant's guilt.

(Citations omitted).

Significance of Defendant's Request That Passing Motorist *Not* Call 911

People v. Bradbury
183 A.D.3d 1257, 123 N.Y.S.3d 367
(4th Dep't 2020)

> At approximately 6:00 a.m. on the day in question, a passing motorist observed defendant outside of her car, which was stuck in the brush 20 to 30 feet off the roadway. The motorist stopped to offer assistance, but defendant said that she was all right and did not want the motorist to call 911. She said that another person had been driving the car when the car crashed and had fled the scene. The motorist called 911. * * *
>
> Although defendant's request that the passing motorist not call 911 constituted evidence of consciousness of guilt, it is well settled that consciousness of guilt evidence is a "weak" form of evidence.

(Citation omitted).

Admissibility of Statement Secretly Recorded by Defendant's Friend

People v. Lotin
187 A.D.3d 937, 130 N.Y.S.3d 741
(2d Dep't 2020)

The defendant was involved in a motor vehicle accident and fled the scene of the accident without reporting it. Following the accident, the defendant's friend used the recording feature on his iPod touch to secretly record an in-person conversation that he had with the defendant, during which the defendant admitted that he had been drinking alcohol and that he was involved in a motor vehicle accident. The defendant's friend gave the iPod touch with the recording to the police, and a CD of the recording was made. At trial, the prosecutor and defense counsel agreed to redact certain portions of the recording and a redacted copy of the recording was admitted into evidence. The defendant was convicted of [DWAI], reckless driving, leaving the scene of an incident without reporting . . . and tampering with physical evidence.

Admissibility of [a] recorded conversation "requires proof of the accuracy or authenticity of the [recording] by 'clear and convincing evidence.'" Such a foundation "may be established by a participant to the conversation who testifies that the conversation has been accurately and fairly reproduced." Here, we agree with the Supreme Court's determination to admit into evidence the redacted copy of the recording of the in-person conversation between the defendant and his friend. The defendant's friend testified at trial that the copy of the recording on the CD fairly and accurately depicted the in-person conversation that he had with the defendant, which established by clear and convincing evidence that the recording was accurate and had not been altered beyond the redactions to which the defendant agreed.

(Citations omitted).

Admissibility of Statement Recorded by Jail

People v. Shear
186 A.D.3d 1537, 130 N.Y.S.3d 837
(2d Dep't 2020)

> We agree with the County Court's determination allowing the admission into evidence of recordings of telephone calls the defendant made during his pretrial detention at the Suffolk County Jail. There is no merit to the defendant's claim that the admission of the recordings was improper because he did not consent to the release of the recordings to the prosecution, as the defendant had no reasonable expectation of privacy in the content of the recorded communications. Furthermore, the admission of the recordings did not violate the defendant's right to counsel under the State and Federal Constitutions, or his right to participate in the preparation of his own defense.

(Citations omitted).

IDTU Video Issues

People v. Khan
2020 WL 1977125
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

> After the completion of jury selection but prior to opening statements, the People made a motion in limine to have only a portion of the IDTU video admitted into evidence at trial, which motion the Criminal Court granted. We find that the Criminal Court's ruling did not violate the rule of completeness, since the excluded portion contained nothing exculpatory and was not explanatory.

(Citation omitted).

Improper Comments During Summation

People v. Rahman
189 A.D.3d 1616, 134 N.Y.S.3d 819
(2d Dep't 2020)

We note . . . that certain of the prosecutor's remarks were improper -- for example, that the defendant had to have consumed more than [3] beers in order to have a blood-alcohol content of .135 -- as they were not based on trial evidence or reasonable inferences drawn from the evidence.

Ignition Interlock Device ("IID") Issues

People v. Mayerat
188 A.D.3d 1667, 135 N.Y.S.3d 552
(4th Dep't 2020)

> Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of [DWI] as a class E felony and imposing a sentence of incarceration. We affirm.
>
> [A] preponderance of the evidence supports the court's determination that defendant violated the condition requiring him to install an [IID] on any vehicle he operated. The evidence at the hearing established that defendant did not install such a device on a vehicle owned by his ex-wife, with whom defendant resided. In addition, affording the requisite "great deference" to the court's credibility determinations, we perceive no basis for disturbing the court's implicit conclusion that the ex-wife's vehicle was operated by defendant and subject to the [IID] requirement. Indeed, we note that, shortly before the filing of the declaration of delinquency, defendant was convicted of another DWI offense in connection with his operation of his ex-wife's vehicle in violation of that same condition.

(Citations omitted).

People v. Boldt
185 A.D.3d 1551, 128 N.Y.S.3d 401
(4th Dep't 2020)

> The probation or conditional discharge imposed pursuant to [PL §] 60.21 is to run consecutively to any period of imprisonment imposed pursuant to [PL] article 70. Here, however, defendant was not sentenced to a period of imprisonment pursuant to [PL] article 70. Rather, he was sentenced on each count to a traditional split sentence pursuant to [PL] § 60.01(2)(d), with the period of probation running concurrently with the period of imprisonment. Thus, [PL] § 60.21 is inapplicable to this case and does not preclude the imposition of a sentence of imprisonment upon the revocation of probation. We note that where, as was originally the case here, a court chooses to impose a split sentence under [PL] § 60.01(2)(d), or chooses to impose a sentence of probation only, it may impose an [IID] as a condition of probation.

(Citations omitted).

Is Defendant Entitled to Hearing on Alleged IID Violation?

People v. Day
67 Misc. 3d 54, 122 N.Y.S.3d 858
(App. Term, 9th & 10th Jud. Dist. 2020)

Defendant allegedly violated her IID conditions due to several "failed blows." As part of a resolution of the ensuing declaration of delinquency:

> [D]efendant admitted to a failed blow [with the] understanding . . . that, as a result of her admission, she would be released from [jail] under the supervision of probation and, "if there [we]re no problems" for [6] months, she would be resentenced to time served. However, if there were "problems," then she would be resentenced to [6] months in jail.

Following a subsequent "failed blow," the issue arose as to whether the defendant could be summarily sentenced to jail, or rather whether she had the right to a hearing to contest the new allegation. Town Court held that a hearing was not required. The Appellate Term disagreed:

> [W]e are of the opinion that the allegation of defendant's violation of the [IID] which formed the basis of the second declaration of delinquency, did not constitute a violation of an enhanced resentencing agreement. Rather, given that a second declaration of delinquency had been issued by the court, the alleged violation involved a term of a sentence of conditional discharge and its possible revocation, which issue entitled defendant to a hearing pursuant to CPL 410.70. Thus, the Justice Court erred in denying defendant's request for such a hearing.
>
> Accordingly, the amended judgment is reversed and the matter is remitted to the Justice Court for a hearing pursuant to CPL 410.70 as to whether defendant violated a condition of her sentence and for a new determination thereafter.

Cf. **People v. He**, 2020 WL 1037558 (Queens Co. Sup. Ct. 2020).

7-Day Sentence for DWAI Upheld

People v. Martinez
186 A.D.3d 1165, 130 N.Y.S.3d 460
(1st Dep't 2020)

Judgment, Supreme Court, Bronx County (Richard L. Price, J.), rendered June 26, 2013, convicting defendant, after a nonjury trial, of [DWAI], and sentencing him to [7] days of incarceration, a $400 fine, and completion of a drinking while driving program, unanimously affirmed. * * *

We perceive no basis for reducing the sentence.

State Prison Sentence for Consuming Alcohol While on Felony DWI Probation Upheld

People v. Peasley
184 A.D.3d 911, 123 N.Y.S.3d 550
(3d Dep't 2020)

> Following a jury trial, defendant was convicted of, among other things, [DWI] as a felony and was sentenced in March 2015 to [5] years of probation. In June 2017, defendant was arrested after the police responded to a domestic incident call involving defendant and his girlfriend. Defendant was subsequently charged with violating certain terms of his probation. Following a hearing, County Court found that defendant had violated the condition of his probation requiring that he refrain from consuming alcoholic beverages. At sentencing, County Court revoked defendant's probation and imposed a prison sentence of 1 to 3 years. Defendant appeals. * * *
>
> An arresting officer testified that defendant was combative and belligerent during the incident in question, had bloodshot eyes and emitted an odor of alcohol. The officer further testified that, based upon his observations and training as to the indicia of intoxication, defendant was intoxicated at the time of his arrest. According deference to County Court's determination to credit the officer's testimony, the court's finding that defendant violated a condition of his probation was supported by a preponderance of the evidence. As to defendant's challenge to the severity of his sentence, our review of the record reveals neither an abuse of County Court's discretion nor the presence of extraordinary circumstances warranting a reduction of the sentence in the interest of justice.

(Citations omitted).

Defendant Cannot Renege on Alcohol Evaluation Fee Merely Because Dissatisfied with Result

Falanga v. Fierstadt
2020 WL 629577
(App. Term, 9th & 10th Jud. Dist. 2020)

> [P]laintiff [was] hired by defendant to submit an evaluation to defendant's criminal attorney on defendant's pending [DWI] arrest. She met with defendant and made relevant inquiries in preparation for her evaluation. Defendant paid her $450 for those services by means of his credit card. About a week later, plaintiff submitted her evaluation to defendant's criminal attorney, recommending that defendant undergo short-term substance abuse treatment based on her screening and his prior D.W.I. arrest. Shortly thereafter, defendant reversed the charges on his credit card. Defendant testified that he was dissatisfied with plaintiff's recommendation that he undergo short-term substance abuse treatment because . . . his first D.W.I. arrest had occurred 17 years earlier, . . . he is not an alcoholic and . . . he was only a "half drink over the legal limit." After trial, the District Court awarded plaintiff the principal sum of $450. * * *
>
> [T]he record supports the trial court's finding that plaintiff had performed the agreed-upon services for defendant and that defendant had breached the contract by failing to pay for those services. Defendant was not permitted to withhold payment merely because defendant was dissatisfied with plaintiff's recommendation.

Indigent Defendant's Ability/Inability to Pay Fine

People v. Cheatham
2020 WL 939408
(App. Term, 2d, 11th & 13th Jud. Dist. 2020)

> Under the circumstances presented, we find that the sentences imposed did not constitute an abuse of sentencing discretion or a failure to observe sentencing principles, and defendant has not demonstrated the existence of mitigating or extraordinary circumstances warranting a modification of the sentences in the interest of justice. Moreover, the fines are not inherently onerous and the fact that defendant was represented by counsel from the Legal Aid Society in the Criminal Court and, now on appeal, by assigned counsel is insufficient to merit the inference that he is unable to pay the fines. The record reveals that defendant had been employed by the Department of Education as a courier for more than 10 years, and there was no evidence in the record indicating that defendant lacked the resources to pay the fines or to install and maintain an [IID] in any motor vehicle owned or operated by defendant for [3] years. Although defendant now claims that he is indigent, he never sought relief from the fines by way of a CPL 420.10(5) motion, or from the [IID] requirement as a condition of probation by way of a CPL 410.20(1) motion for resentencing. Our disposition is without prejudice to defendant moving in the Criminal Court, if he be so advised, for relief from the fines and the [IID] requirement.

(Citations omitted).

Suspension Pending Prosecution

People v. Davies

2021 WL 801939
(Rye City Ct. 2021)

> The defendant contends that since he was allegedly driving the motor vehicle on a private road he owns, he cannot be suspended [pending prosecution]. VTL 1192(7) says "7. The provisions of this section shall apply upon . . . private roads open to motor vehicle traffic . . . ." It is stipulated here that Palisade Place is a private road that provides access to at least [2] driveways (defendant's and the neighbor's adjoining to the east). Accordingly, Palisade Place falls within the purview of the prompt suspension law.
>
> Despite the fact that a lawful VTL § 1192 arrest is a prerequisite to a valid request to submit to a chemical test, and despite the fact that VTL § 1193(2)(e)(7) requires that the driver fail a chemical test *administered pursuant to* VTL § 1194, neither VTL § 1193(2)(e)(7) nor Pringle appear to contemplate that the driver can challenge the lawfulness of his or her arrest at a Pringle hearing.

(Citation omitted).

What Drugs Count for Purposes of VTL § 1192(4)?

VTL § 1192(4) requires that the drug causing the defendant's impairment must be "a drug as defined in this chapter." Prior to March 31, 2021, VTL § 114-a provided that:

> The term "drug" when used in this chapter, means and includes any substance listed in section [3306] of the public health law.

Effective March 31, 2021, VTL § 114-a provides that:

> The term "drug" when used in this chapter, means and includes any substance listed in section [3306] of the public health law and cannabis and concentrated cannabis as defined in [PL § 222.00].

The reason for the change is that, effective March 31, 2021, cannabis and concentrated cannabis were removed from the PHL § 3306 list of controlled substances -- but they are still drugs that count for purposes of the VTL.

Significance of Odor of Burnt Marijuana

Effective March 31, 2021, PL §§ 222.05(3) and 222.05(4) provide, in pertinent part:

> 3. Except as provided in [PL § 222.05(4)], in any criminal proceeding including proceedings pursuant to [CPL § 710.20], no finding or determination of reasonable cause to believe a crime has been committed shall be based solely on evidence of the following facts and circumstances, either individually or in combination with each other:
>
> (a) the odor of cannabis;
>
> (b) the odor of burnt cannabis; [or]
>
> (c) the possession of or the suspicion of possession of cannabis or concentrated cannabis in the amounts authorized in this article. * * *
>
> 4. [PL § 222.05(3)(b)] shall not apply when a law enforcement officer is investigating whether a person is operating a motor vehicle, vessel or snowmobile while impaired by drugs or the combined influence of drugs or of alcohol and any drug or drugs in violation of [VTL §§ 1192(4) or 1192(4-a)], or [Navigation Law § 49-a(2)(e)], or [PRHPL § 25.24(1)(d)]. During such investigations, the odor of burnt cannabis shall not provide probable cause to search any area of a vehicle that is not readily accessible to the driver and reasonably likely to contain evidence relevant to the driver's condition.

See also **People v. Sanchez**, 196 A.D.3d 1010 n.2, ___ N.Y.S.3d ___ n.2, 2021 WL 3195174, n.2 (3d Dep't 2021); **People v. Ponder**, 195 A.D.3d 123, 125 n.1, 146 N.Y.S.3d 628, 630 n.1 (1st Dep't 2021).

DRIVING WHILE ABILITY IMPAIRED BY DRUGS
Vehicle and Traffic Law 1192(4)

EXPLANATORY NOTE ON DEFINITION OF IMPAIRMENT

In a prosecution for vehicular homicide, the basic crime, vehicular manslaughter in the second degree, Penal Law § 125.12(1), is committed in pertinent part when a person "operates a motor vehicle in violation of subdivision two, three, four or four-a of section eleven hundred ninety-two of the vehicle and traffic law . . . and as a result of such intoxication or impairment by the use of a drug or by the combined influence of drugs or of alcohol and any drug or drugs, operates such motor vehicle . . . in a manner that causes the death of such other person. The language "such . . . impairment by the use of a drug" refers back to VTL 1192(4) and (4-a), which define the misdemeanors of driving while "impaired by the use of a drug" (subd 4) or by the combined use of drugs and alcohol (subd 4-a).

In *People v. Cruz*, 48 N.Y.2d 419, 428 (1979), a prosecution for driving while intoxicated, the Court of Appeals held that "intoxication is a greater degree of impairment which is reached when the driver has voluntarily consumed alcohol to the extent that he is incapable 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." *Cruz* reasoned that because driving while intoxicated (a misdemeanor), was a more serious offense than driving while impaired by alcohol (a violation), the degree of impairment for intoxication by alcohol must be greater than that for the violation of driving while impaired by alcohol.

In *People v. Caden N.*, 189 A.D.3d 84, 90-91 (3d Dept 2020), *lv. to appeal denied*, 36 N.Y.3d 1050 (2021), a prosecution for vehicular manslaughter that alleged that the defendant's ability to operate a vehicle had been impaired by the use of drugs, the court applied Cruz's definition of "intoxication" in similarly holding that "impairment" by a drug requires that the motorist be "incapable of employing the physical and mental abilities which he [or she was] expected to possess in order

to operate a vehicle as a reasonable and prudent driver." *Caden N.* reasoned that because driving while intoxicated by alcohol and driving while impaired by drugs (or a combination of drugs and alcohol) were both misdemeanors, making both the basis of a prosecution for vehicular manslaughter "can only be deemed consistent with the legislative scheme if the same standard is applied to each misdemeanor category included in the vehicular manslaughter statute." 189 A.D.3d at 90. In so holding, the Third Department overruled *People v. Rossi*, 163 A.D.2d 660, 662 (3d Dept. 1990), "[t]o the extent that [it] can be read as holding that a conviction of vehicular manslaughter in second degree based upon a violation of Vehicle and Traffic Law § 1192(4) only requires proof that the motorist was impaired 'to any extent'." *Id.* at 91.

Caden N. did not explicitly discuss whether the standard for impairment for purposes of a prosecution for manslaughter in the second degree was also the standard to be applied in a prosecution for only VTL 1192(4), nor did *Caden N*. suggest that its definition of "impairment" for purposes of vehicle manslaughter was, notwithstanding the statutory language of "such…impairment by the use of a drug," different than that for the same term in a prosecution of VTL 1192(4). *Caden N.* simply applied in the vehicular manslaughter case before it, the *Cruz* rationale, that the misdemeanors of driving while intoxicated and driving while impaired by the use of drugs should have the same standard of what constitutes impairment.

For these reasons, until an appellate court decides otherwise, CJI2d has employed *Caden N.*'s definition of "impaired" in the instructions for vehicular manslaughter and the parallel, vehicular assault charges, and in those for the misdemeanor impairment by a drug or combination of drug and alcohol offenses in VTL 1192(4), (4-a) and (2-a)(b). We recognize, however, that a trial court is not bound to follow the CJI2d instruction and may instead decide to apply *Caden N.'s* definition of impairment for a vehicular manslaughter or assault charge and the impaired "to any extent" definition for a VTL driving while impaired by the use of a drug or combination of alcohol and drugs charge, as set forth in the footnote to the definition of impaired.

DRIVING WHILE ABILITY IMPAIRED BY DRUGS[1]

Vehicle and Traffic Law 1192(4)
(Committed on or after Nov. 1, 1988)
(Revised Jan. 2008 & Dec. 2021)[2]

The (*specify*) count is Driving While Ability Impaired by Drugs.

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[1] This crime is classified a misdemeanor unless:

[1] If the defendant has within the previous ten years been convicted of a violation of Vehicle and Traffic Law § 1192(2), (3), or (4), or of Penal Law §§ 120.03, 120.04, 125.12, or 125.13, a conviction of driving while ability impaired by drugs is a class E felony. Vehicle and Traffic Law § 1193(1)(c)(i).

[2] If the defendant has within the previous ten years twice been convicted of any of those crimes, a conviction of driving while ability impaired by drugs is a class D felony. Vehicle and Traffic Law § 1193(1)(c)(ii). For the gradation of the offense for "special vehicles" see Vehicle and Traffic Law § 1193(1)(d).

Thus, an additional element of this crime when charged as a Class D or E felony is that the defendant has previously been convicted of one or more particular crimes. That element must be charged in a special information, and after commencement of trial the defendant must be arraigned on that special information. If, upon such arraignment, the defendant admits the element, the court must not make any reference to it in the definition of the offense or in listing the elements of the offense. But if the defendant denies the element or remains mute, the court must add the element to the definition of the offense and the list of elements. CPL § 200.60. *See People v. Cooper*, 78 N.Y.2d 476 (1991).

[2] The January 2008 revision was for the purpose of providing a clearer definition of "operates" by removing the language "for the purpose of placing it in operation" and replacing such language with "for the purpose of placing the vehicle in motion." *See People v Alamo*, 34 NY2d 453, 458 (1974); *People v Marriott*, 37 AD2d 868 (3d Dept. 1971); *People v. O'Connor*, 159 Misc.2d 1072, 1074-1075 (Dist. Ct., Suffolk, 1994). *See also People v. Prescott*, 95 NY2d 655, 662 (2001).

The December 2021 revision was for the purpose of revising the definition of when a person's ability to operate a motor vehicle is impaired by the use of a drug to accord with the holding of *People v. Caden N*, 189 A.D.3d 84 (3d Dept 2020). *Cf. People v Cruz*, 48 NY2d 419, 428 (1979).

Under our law, no person shall operate a motor vehicle while the person's ability to operate such a motor vehicle is impaired by the use of a drug.[3]

The following terms used in that definition have a special meaning:

MOTOR VEHICLE means every vehicle operated or driven upon a public highway [private road open to motor vehicle traffic] [parking lot] which is propelled by any power other than muscular power.[4]

To OPERATE a motor vehicle means to drive it.

[*NOTE: Add the following if there is an issue as to operation:*

A person also OPERATES a motor vehicle when such person is sitting behind the wheel of a motor vehicle for the purpose of placing the vehicle in motion, and when the motor vehicle is moving, or even if it is not moving, the engine is running.[5]]

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[3] In the statute, the word "drug" is followed by the words "as defined in this chapter." Since the charge later sets forth the definition of "drug," the words "as defined in this chapter" have been omitted.

[4] The term "motor vehicle" is defined in Vehicle and Traffic Law § 125. That definition contains exceptions which are not set forth in the text of the charge. The term "public highway" appearing in the definition of "motor vehicle" is itself separately defined in Vehicle and Traffic Law § 134. Further, while the definition of "motor vehicle" is restricted to a vehicle operated or driven on a "public highway," the provisions of Vehicle and Traffic Law § 1192 expressly apply to "public highways, private roads open to motor vehicle traffic and any other parking lot." Vehicle and Traffic Law § 1192(7). (The term "parking lot" is also specially defined by Vehicle and Traffic Law § 1192[7]. *See also People v. Williams*, 66 N.Y.2d 659 [1985].) The definition of "motor vehicle" has been modified to accord with its meaning as applied to Vehicle and Traffic Law § 1192.

[5] *See* cases cited in note 2.

The word DRUG includes (*specify*).[6]

A person's ability to operate a motor vehicle is IMPAIRED by the use of a drug when that person's use of a drug has rendered that person incapable of employing the physical and mental abilities which that person is expected to possess in order to operate a vehicle as a reasonable and prudent driver.[7]

The law does not require any particular chemical or physical test to prove that a person's ability to operate a motor vehicle was impaired by the use of a drug. To determine whether the defendant's ability to operate a motor vehicle was impaired, you may consider all the surrounding facts and circumstances, including, for example:

the defendant's physical condition and appearance, balance and coordination, and manner of speech;

the presence or absence of an odor of a drug;

the manner in which the defendant operated the motor vehicle;

[opinion testimony regarding the defendant's being under the influence of a drug];

[the circumstances of any accident];

[the results of any test for the presence of drugs in the defendant's blood].

[*NOTE: If there is evidence of drugs in the defendant's blood, add, as appropriate, the following paragraphs:*

---

[6] *See* Vehicle and Traffic Law § 114-a and Public Health Law § 3306(1).

[7] As indicated in footnote (1), this definition was revised in December 2021 to accord with the holding of *People v. Caden N*, 189 A.D.3d 84 (3d Dept 2020). The former definition read: "A person's ability to operate a motor vehicle is IMPAIRED by the use of a drug when that person's use of a drug has actually impaired, to any extent, the physical and mental abilities which such person is expected to possess in order to operate a vehicle as a reasonable and prudent driver."

In considering the results of any test given to determine the content of the defendant's blood you must consider:

the qualifications and reliability of the person who gave the test;

the lapse of time between the operation of the motor vehicle and the giving of the test;

whether the device used was in good working order at the time the test was administered; and

whether the test was properly given.[8]

(Evidence that the test was administered by a person possessing a valid New York State Department of Health permit to administer such test allows, but does not require, the inference that the test was properly given.)[9]]

[*NOTE: If there was an improper refusal to submit to a test, add:*

Under our law, if a person has been given a clear and unequivocal warning of the consequences of refusing to submit to a chemical test and persists in refusing to submit to such test, and there is no innocent explanation for such refusal, then the jury may, but is not required to, infer that the defendant refused to submit to a chemical test because he or she feared that the test would disclose evidence of the presence of a drug in violation of law.[10]]

In order for you to find the defendant guilty of this crime, the People are required to prove, from all of the evidence in the case beyond a reasonable doubt, both of the following two elements:

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[8] *People v. Freeland*, 68 N.Y.2d 699 (1986).

[9] *See People v. Freeland*, 68 N.Y.2d 699, 701 (1986)*; People v. Mertz*, 68 N.Y.2d 136, 148 (1986).

[10] *See* Vehicle and Traffic Law § 1194(f); *People v. Thomas*, 46 N.Y.2d 100 (1978), appeal dismissed for want of a substantial federal question, 444 U.S. 891 (1979).

1. That on or about *(date)*, in the County of *(county)*, the defendant, *(defendant's name)*, operated a motor vehicle; and

2. That the defendant did so while his/her ability to operate the motor vehicle was impaired by the use of a drug.

If you find the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of this crime.