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Lake Placid, New York

DWI Case Law

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Presented by:
Peter Gerstenzang, Esq.
1.0 MCLE Professional Practice
1.0 CJE

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Introduction

Peter Gerstenzang is the senior partner in the Albany firm of Gerstenzang,, Sills, Cohn & Gerstenzang where he focuses on Criminal Defense with an emphasis on DWI cases and Vehicular Crimes. Mr. Gerstenzang commenced his legal career as a prosecutor for the United States Army in the Republic of Vietnam. From 1972 to 1975, he was an Assistant District Attorney for the County of Albany. Certified as a breath test operator, he taught at the New York State Police Academy in its Breath Test Training Program for 12 years.

Mr. Gerstenzang is Board Certified by the National College for DUI Defense ("NCDD"), and currently serves as a Dean Emeritus and Fellow of the National College for DUI Defense, which holds an annual seminar in Cambridge, Massachusetts on the campus of Harvard Law School. He previously served on the NCDD's Board of Regents from 2003 to 2013, as Assistant Dean in 2012-2013, and Dean in 2013-2014. The NCDD is the only organization accredited by the American Bar Association to certify attorneys as specialists in DUI law.* His book, ***Handling the DWI Case in New York***, published annually by Thomson/Reuters, is considered a standard reference in the field of Driving While Intoxicated cases.

Peter Gerstenzang is a regular lecturer for the New York State Bar Association, the New York State Association of Criminal Defense Lawyers, the National Association of Criminal Defense Lawyers, the New York State Magistrates Association, and the New York State Defenders Association. In addition, he lectures for numerous County Bar and Magistrates Associations, public defense organizations and the New York State Court Clerks Association.

* The NCDD is not affiliated with any governmental authority. See Rules of Prof. Con., Rule 7.4(c)(1); Hayes v. New York Attorney Grievance Comm. of the 8th Jud. Dist., 672 F.3d 158 (2d Cir. 2012).

NEW YORK STATE MAGISTRATES ASSOCIATION

110TH ANNUAL CONFERENCE

SEPTEMBER 17, 2019

LAKE PLACID, NEW YORK

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PLEA BARGAIN POLICIES

CELL PHONE TICKETS

People v. Mark G. Steger
63 Misc. 3d 815, 97 N.Y.S.3d 818
(Wayne Co. Ct. 2019)

This is an appeal from a conviction after trial for the use of a mobile phone in violation of VTL § 1225(c)(2). In this case, the prosecution and the defense agreed upon a reduction of the cell phone ticket to Failure to Obey a Traffic Control Device, in violation of VTL § 1110(a).

The Court rejected this reduction stating that both judges of the Court had a blanket policy that no reductions would be given in this type of case.

> The court went on to state that it is a personal policy that "we have between both judges. We don't reduce cell phone tickets."

Id. at 816, 97 N.Y.S.3d at 818.

Upon appeal to the County Court, the County Court set forth two issues:

> The first issue deals with plea bargaining and the second issue deals with the appearance of impartiality related to the court's policy on handling cell phone cases.
>
> CPL 220.10(3) permits a defendant to plead guilty to a lesser charge "with both the permission of the court and the consent of the people." It is unquestionable that a court can reject a plea to a lesser charge but such rejection should be supported by the facts and by the law. A blanket policy as articulated by the judge in this case calls into question the propriety of a court's categorical rejection of a proffered plea which both the prosecution and the defendant were willing to accept.

Id. at 816, 97 N.Y.S.3d at 818-819.

The Court held that the announcement of a firm policy rendered CPL 220 meaningless. Rejection of pleas in a cell phone usage case:

> [I]s an improper exercise of judicial discretion. The categorical rejection of certain types of pleas is by its nature an impermissible infringement on the prosecutorial function. It is not within the court's inherent power to instruct a prosecutor regarding his plea bargaining posture. An established policy has precisely this effect. It renders prosecutorial discretion with regard to the type of plea involved meaningless thus forcing the prosecutor to revise his procedures to confirm [sic] with the court's wishes.

Id. at 817, 97 N.Y.S.3d at 819.

> The issue of partiality comes into focus with a blanket no plea policy. Code of Judicial Conduct Canon 2(A) requires that a judge "act at all times in a manner that promotes public confidence in the...impartiality of the judiciary." Closing the door to plea bargaining for every cell phone violation gives an impartial observer the impression that the judge may be favoring conviction of the charge. An inference of partiality is something the judiciary should strive to avoid.

Id. at 817, 97 N.Y.S.3d at 819.

The County Court reversed the conviction and ordered the transfer of the case to another town.

PROBATION VIOLATION

People v. Nicholson
237 A.D.2d 973, 654 N.Y.S.2d 906
(4th Dep't 1997)

In People v. Nicholson, 237 A.D.2d 973, 654 N.Y.S.2d 906 (4th Dep't 1997) the trial Court's sentence of a defendant for a violation of probation was vacated and remanded. The reason the sentence was vacated was the fact that the Court had a policy of sentencing defendants found to be in violation of probation to the maximum sentence. This was a per se rule that the Court announced at the time of sentencing. Here, the Appellate Court held that: "the imposition of a sentence pursuant to an inflexible, per se rule without exercising discretion after due consideration of the appropriate factors is improper." Nicholson, 237 A.D.2d at 973, 654 N.Y.S.2d 906 (citations omitted).

SENTENCING OF DWAI TEST REFUSAL

People v. McSpirit
154 Misc. 2d 784, 595 N.Y.S.2d 660
(App. Term, 9th & 10th Jud. Dist. 1993)

In People v. McSpirit, 154 Misc. 2d 784, 595 N.Y.S.2d 660 (App. Term, 9th & 10th Jud. Dist. 1993), the Appellate Term modified a sentence where it was imposed pursuant to an announced policy: "we are of the view that the policy as such is arbitrary, capricious and unauthorized by statute" (citation omitted), "it ignores, moreover, other criteria warranting an impartial and judicious evaluation, e.g., 'the crime charged, the particular circumstances of the individual before the Court, and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence'" (citations omitted).

REFUSAL TO ACCEPT PLEA BARGAIN ON EVE OF TRIAL

People v. Compton
157 A.D.2d 903, 550 N.Y.S.2d 148
(3d Dep't 1990)

Insofar as plea bargaining is concerned, in People v. Compton, 157 A.D.2d 903, 550 N.Y.S.2d 148 (3d Dep't 1990), the Appellate Division considered a situation in which the Tompkins County Court refused to accept a plea bargain on the eve of trial. The County Court's position in this regard is a common one. Both superior and local criminal courts will frequently adopt a policy that precludes a last-minute plea bargain on the eve of jury selection or commencement of trial.

As is the case of the issue considered here, while common, such a policy is improper. Here, the appellate court did not reverse the conviction because the defendant expressly declined to request that remedy. While the Court was required to affirm the conviction in the absence of such a request, it held: "defendant contends that County Court abused its discretion in refusing to permit him to plead guilty to the reduced charge, based solely upon its policy of not accepting such a plea on the eve of trial.

In our view, this contention has merit. We cannot endorse a Court's general policy of not permitting plea bargains based on circumstances unrelated to the particular defendant and the proposed bargain at issue." Compton, 157 A.D.2d at 903, 550 N.Y.S.2d 148 (citations omitted).

REFUSAL TO REDUCE VTL § 1192 CHARGES AS A MATTER OF POLICY

People v. Glendenning
127 Misc. 2d 880, 487 N.Y.S.2d 952
(Westchester Co. Sup. Ct. 1985)

People v. Glendenning, 127 Misc. 2d 880, 487 N.Y.S.2d 952 (Westchester Co. Sup. Ct. 1985), is probably one of the best discussions of the issue of judicial policies. The decision is helpful because Judge Colabello sets forth comprehensive guidance in regard to the judiciary's role in the plea bargaining process. Here, the defendant brought an Article 78 proceeding seeking an Order from Supreme Court transferring his case from the Village Court of Scarsdale to the Town Court of the Town of Eastchester. The basis for the proceeding was the Scarsdale Judge's policy of refusing to reduce VTL § 1192 charges. In granting the defendant's motion, the Court sets forth the principles governing plea bargaining. Accordingly, I have quoted much of Judge Colabello's analysis below:

> The question of the judiciary's role in the plea bargaining process is brought into play with the instant fact pattern. Article 220 of the Criminal Procedure Law permits a defendant to plead guilty to a lesser charge "with both the permission of the court and the consent of the people". (CPL Art. 220.10[3]). There can be no question that a court can reject a plea to a lesser count but such rejection should be supported by the facts and by the law. A blanket policy as enunciated by the Lower Court Judge in this case draws into question the propriety of a Court's categorical rejection of proffered

pleas which both the prosecutor and the defendant are willing to enter. A fortiori, when the prosecutor offers the reduced plea in the first instance.

The judicial role in plea bargaining is that of overseeing and supervising the delicate balance of public and private interests. The Court is to act as an impartial referee and not as an advocate. *People v. Cruz*, 100 A.D.2d 518, 473 N.Y.S.2d 21 (1984). This posture keeps the Court within the scope of the Separation of Powers Doctrine, under which the Executive Branch, represented by the prosecutor, has the primary responsibility for determining which violations of the law shall be prosecuted. *People v. Selikoff*, 35 N.Y.2d 227, 360 N.Y.S.2d 623, 318 N.E.2d 784 (1974). ...

Plea bargaining, which is an exercise of prosecutorial and judicial discretion, enables sentences to be tailored to both the offense and the offender. A Judge who announces that her future actions will be dictated by policy fails to exercise any discretion and makes no allowance for this fundamental precept of our system of justice. In essence, a Judge who announces a firm policy waives the benefits of plea bargaining arbitrarily, and without deliberation. She renders Article 220 of the Criminal Procedure Law meaningless. This is clearly contrary to the legislative intent in respect to drunk driving cases. It is fundamental that a Judge should not replace her judgment for that of our legislature, regardless of the "propriety, wisdom, necessity, adequacy, efficacy, utility, desirability [or] expediency * * * of [that] legislation". (20 NY Jur 2d, Constitutional Law, § 72.)

The policy of rejecting pleas in Driving While Intoxicated cases is an improper exercise of judicial discretion. The categorical rejection of certain types of pleas is by its nature an impermissible infringement on the prosecutorial function. It is not within the court's inherent power to instruct the prosecutor regarding his plea bargaining posture. An established policy has precisely this effect. It renders prosecutorial discretion with regard to the

type of plea involved meaningless thus forcing the prosecutor to revise his procedures to conform with the Court's wishes. An announced policy also runs contrary to the purposes of plea bargaining. A legitimate goal of a prosecutor's charging decision is to avoid the stigma of a particular conviction to a particular defendant. The prosecutor, it should be noted, is in the best position to determine whether resources should be devoted to trials of drunk driving cases or elsewhere. A blanket policy of rejecting these pleas obviates both the need for prosecutorial discretion and the goal of individualized sentences and justice."

* * * * * * * *

The announced policy of the local court Judge also runs afoul of the Code of Judicial Conduct adopted by the New York State Bar Association effective March 3, 1973. (For rules governing judicial conduct, *see*, Rules of State Commn on Judicial Conduct, 22 NYCRR Section 7000.1 *et seq.*; also, Edwards, *Commentary on Judicial Ethics*, 38 Fordham L Rev 259.)

The Code of Judicial Conduct, Canon 3(A)(1) requires that a judge be "unswayed by partisan interests, public clamor, or fear of criticism". This section is particularly relevant because drunk driving cases have received much publicity in recent times and there is no doubt tremendous pressure placed upon judges in the Courts to come down hard on drunk drivers. The obvious way for a Judge to respond to this public clamor is for her to devise and make a public announcement of a fixed policy of refusing to allow plea bargaining in driving while intoxicated cases.

Such a so-called announced policy also violates Canon 3(A)(6) which states, *inter alia*, "A judge should abstain from public comment about a *pending* or *impending* proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the

> course of their official duties or from explaining for public information the procedures of the court" (emphasis added).
>
> It is obvious that the local court Justice in the instant case by announcing its "policy" is making a "public comment about a pending or impending proceeding in [her] court".

Id. at 881-883, 487 N.Y.S.2d at 952-55.

PUBLIC ANNOUNCEMENT OF SENTENCING POLICY

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in relation to Edward J. Tracy, a Justice of the Moreau Town Court, Saratoga County, the Commission considered a case where the respondent Judge had made a public announcement of a "policy" concerning the strict sentence he would impose on all defendants in certain drunk driving cases. Holding the pronouncement of this policy to be improper, the Committee stated:

> Such a pronouncement is inconsistent with the role of a judge in our legal system, which is to apply the law in each case in a fair and impartial manner (Sections 100.2[A] and 100.3[B][1] of the Rules). While the expression of such a blanket "policy" against drunk drivers may pander to popular sentiment that all such defendants should be treated harshly, respondent's words conveyed the appearance that he would not, and did not, consider each case individually on the merits, after a fair hearing, as he is required to do. Judicial discretion, which is at the heart of a judge's powers, is nullified when a judge imposes a "policy" that will dictate sentences in future cases. In the exercise of discretion, respondent may impose any sentence permitted by law in such cases, but only after considering the facts of each case and affording each defendant an opportunity to be heard according to law (*see* Section 100.3[B][6] of the Rules). Public confidence in the impartiality and independence of the judiciary is diminished by such statement.

A copy of the opinion is attached hereto as EXHIBIT A.

INTOXICATION RESTRICTED TO ALCOHOL?

People v. Litto
8 N.Y.3d 692, 840 N.Y.S.2d 736
(2007)

Unlike VTL §§ 1192(1), (2), (2-a), (4) and (4-a) -- VTL § 1192(3) does not expressly mandate that the defendant's intoxication be caused by any particular substance. Nonetheless, the Court of Appeals has made clear that the phrase "driving while intoxicated," as used in VTL § 1192(3), means driving while intoxicated by alcohol. See People v. Litto, 8 N.Y.3d 692, 840 N.Y.S.2d 736 (2007). Specifically, the Litto Court held that:

> Over the last 97 years, the Legislature has crafted and repeatedly refined statutes with the goal of removing from the road those who drive while intoxicated. This appeal centers on the phrase "driving while intoxicated" in Vehicle and Traffic Law § 1192(3). Based on the language, history and scheme of the statute, we conclude that the Legislature here intended to use "intoxication" to refer to a disordered state of mind caused by alcohol, not by drugs.

Id. at 693-94, 840 N.Y.S.2d at 736-37. See also People v. Farmer, 36 N.Y.2d 386, 390, 369 N.Y.S.2d 44, 45 (1979) ("subdivisions 1, 2 and 3 of section 1192 proscribe separable offenses based upon the degree of impairment caused by alcohol ingestion"); People v. Bayer, 132 A.D.2d 920, ___, 518 N.Y.S.2d 475, 476 (4th Dep't 1987) (VTL § 1192 "[s]ubdivision (3) prohibits operation of a motor vehicle while defendant 'is in an intoxicated condition', but does not refer to a substance creating the condition. It is clear as a matter of law, however, that the subdivision is intended to apply only to intoxication caused by alcohol"). See generally People v. Cruz, 48 N.Y.2d 419, 428, 423 N.Y.S.2d 625, 629 (1979) (for purposes of VTL § 1192(3), "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").

In People v. Tracey, 25 Misc. 3d 849, 885 N.Y.S.2d 559 (Livingston Co. Ct. 2009), the Court confronted the issue of whether ethylene glycol (*i.e.*, anti-freeze) constitutes "alcohol" for purposes of VTL § 1192(3). Concluding that it does not, the Court reasoned as follows:

> This court must now determine whether the consumption of alcohol refers to ethyl alcohol or any substance chemically defined as an alcohol. * * *

> This court could find no reported case directly on point. However, the language used and history recited by the Court of Appeals in Litto was highly instructive on the issue before this court. * * *
>
> The term "intoxication" is now defined using the phrase "consumed alcohol" in place of "imbibed enough liquor." But, "alcohol" has virtually the same meaning as "liquor" did in 1919. While "alcohol" is not defined in the Vehicle and Traffic Law (as "liquor" was not in 1910), the legislature has defined it in the Alcoholic Beverage Control Law. "'Alcohol' means ethyl alcohol, hydrated oxide of ethyl or spirit of wine." "Alcoholic beverages" are defined as spirits, wine, liquor, beer, cider and every liquid containing alcohol and capable of being consumed by a human being.
>
> Therefore, the conclusion is inescapable that "intoxication" meant in 1910 and still means today intoxication by the consumption of alcoholic beverages. Alcoholic beverages meaning spirits, wine, liquor, beer, cider and every liquid containing alcohol and capable of being consumed by a human being. In other words, ethyl alcohol. Ethyl alcohol is also known as ethanol or drinking alcohol. * * *
>
> Ethylene glycol, while technically defined as an alcohol, is not an alcoholic beverage. It is not manufactured for human consumption and it is hazardous to human health. * * *
>
> Therefore, to be charged with driving while intoxicated, a defendant must be "intoxicated" by the consumption of alcohol, more specifically an alcoholic beverage.
>
> A defendant may not be charged with driving while intoxicated based upon the presence of *ethylene glycol*.

Id. at ___, ___, ___, ___, 885 N.Y.S.2d at 560, 561, 562, 563 (citations omitted).

THE 2-HOUR RULE

People v. Odum
31 N.Y.3d 344, 78 N.Y.S.3d 252
(2018)

> [VTL] §§ 1194 and 1195 generally govern the administration and admissibility of chemical breath tests used to determine blood alcohol content. Section 1195(1) provides that the results of such tests are admissible in evidence at a criminal trial if the tests are "administered pursuant to the provisions of section [1194]." The results of a test also may be admissible absent compliance with section 1194 where a defendant has voluntarily consented to the test because section "1194 . . . ha[s] no application where the defendant expressly and voluntarily consented to a [chemical] test." Here, because the breathalyzer test was not administered in accordance with the requirements of section 1194 and defendant's consent to take the test was not voluntary, as required by Atkins, the results of the test were properly suppressed.

(Emphasis added) (citation omitted). See also People v. Roy R., 60 Misc. 3d 624, 77 N.Y.S.3d 632 (N.Y. City Crim. Ct. 2018); People v. Labate, 2018 WL 3559238 (N.Y. City Crim. Ct. 2018).

APPLICABILITY OF THE 2-HOUR RULE TO DMV CHEMICAL TEST REFUSAL HEARINGS

Matter of Endara-Caicedo v. New York State Dep't of Motor Vehicles
59 Misc. 3d 984, 74 N.Y.S.3d 839
(Bronx Co. Sup. Ct. 2018)

> VTL § 1194(2)(a), or the "implied consent" provision of the statute, provides that all New York drivers are deemed to have consented to a chemical breath test within [2] hours after he or she is arrested on suspicion of [DWI], or within [2] hours after the administration of a preliminary breath test. Accordingly, if a driver refuses to consent to the test within that time frame -- assuming proper warnings were given of the consequences beforehand -- the driver has revoked that deemed consent and thus he or

> she incurs civil penalties including driver's license revocation. It logically follows that following this [2]-hour period, a driver is no longer deemed to have consented to a chemical test, and thus the driver cannot be subject to civil penalties for refusing to take the test. * * *
>
> Respondent's June 29, 2012 opinion of counsel is not binding and Respondent does not argue that it is entitled to deference under these circumstances.

CAN YOU BE CONVICTED OF ATTEMPTED DWI/
CAN YOU PLEAD GUILTY TO IT?

People v. Prescott
263 A.D.2d 254, 704 N.Y.S.2d 410
(4th Dep't 2000)

People v. Foster
19 N.Y.2d 150, 278 N.Y.S.2d 603
(1967)

In People v. Prescott, 263 A.D.2d 254, 704 N.Y.S.2d 410 (4th Dep't 2000), the Appellate Division, Fourth Department, *temporarily* created the crime of attempted DWI. On appeal, however, the Court of Appeals reversed, holding that attempted DWI is *not* a legally cognizable offense. People v. Prescott, 95 N.Y.2d 655, 722 N.Y.S.2d 778 (2001).

Interestingly, however, although attempted DWI is not an appropriate *charge*, it apparently can be a valid *plea bargain*. See People v. Foster, 19 N.Y.2d 150, 278 N.Y.S.2d 603 (1967) (plea of guilty to nonexistent crime not invalid where defendant sought, and freely and knowingly accepted, such plea as part of a plea bargain struck for defendant's benefit). See also People v. Johnson, 23 N.Y.3d 973, 975, 989 N.Y.S.2d 680, 681 (2014) ("Where a defendant enters a negotiated plea to a lesser crime than one with which he is charged, no factual basis for the plea is required. Indeed, under such circumstances defendants can even plead guilty to crimes that do not exist") (citations omitted); People v. Francis, 38 N.Y.2d 150, 155, 379 N.Y.S.2d 21, 26 (1975) ("a plea may be to a hypothetical crime"); People v. Keizer, 100 N.Y.2d 114, 118 n.2, 760 N.Y.S.2d 720, 723 n.2 (2003) (same); People v. Clairborne, 29 N.Y.2d 950, 951, 329 N.Y.S.2d 580, 581 (1972) ("A bargained guilty plea to a lesser crime makes unnecessary a factual basis for the particular crime confessed"); Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 110.00, at 85 ("Though there may not logically be

an attempt to commit a particular substantive crime, a bargained-for guilt plea to such an attempt struck for the defendant's benefit may not be set aside on appeal").

One reason why a defendant might find a plea bargain to attempted DWI to be advantageous is that "license sanctions could not be administered because it is not apparent under the Vehicle and Traffic Law what period of revocation or suspension should be imposed upon someone who commits 'attempted' driving while intoxicated." Prescott, 95 N.Y.2d at 662 n.7, 722 N.Y.S.2d at 782 n.7.

CAN THE DEFENSE ARGUE DEFENDANT'S BAC WAS LESS THAN .08% AT TIME OF OPERATION? PEOPLE HAVE INTRODUCED TEST RESULT OF .08 OR MORE.

People v. Mertz
68 N.Y.2d 136, 506 N.Y.S.2d 290
(1986)

In People v. Mertz, 68 N.Y.2d 136, 139, 506 N.Y.S.2d 290, 291 (1986), the Court of Appeals held that:

> A violation of Vehicle and Traffic Law § 1192(2) is not established unless the trier of fact finds that while operating a motor vehicle defendant had a blood alcohol content (BAC) of .[08] of 1% or more. . . . It is . . . error not to permit defendant's attorney to argue on the basis of evidence, whether through cross-examination of the People's witnesses or testimony of defendant's witnesses, expert or other, from which it could be found that defendant's BAC at the time of vehicle operation was less than .[08]%, that if the jury so found defendant was not guilty of violating the subdivision.

See also id. at 146-47, 506 N.Y.S.2d at 295-96 ("When . . . such evidence has been presented, defendant must be permitted to argue its significance to the jury. Because he was foreclosed from doing so and because the court's ruling during defendant's attorney's summation and its instructions at the close of the case were in conflict on this issue, there must be a reversal").

MUST DWI BE PROVED TO HAVE OCCURRED ON A PUBLIC HIGHWAY PURSUANT TO VTL § 1192(7)?

VTL § 1100(a) provides that "[t]he provisions of [VTL Title VII] apply upon public highways, private roads open to public motor vehicle traffic and any other parking lot, *except where a*

different place is specifically referred to in a given section." (Emphasis added). VTL § 1192 is part of VTL Title VII. However, VTL § 1192(7) provides an exception of the type referred to in VTL § 1100(a). Specifically, VTL § 1192(7) expressly lists the types of roadways upon which the provisions of VTL § 1192 apply:

> Where applicable. The provisions of this section shall apply upon public highways, private roads open to motor vehicle traffic and any other parking lot. For the purposes of this section "parking lot" shall mean any area or areas of private property, including a driveway, near or contiguous to and provided in connection with premises and used as a means of access to and egress from a public highway to such premises and having a capacity for the parking of four or more motor vehicles. The provisions of this section shall not apply to any area or areas of private property comprising all or part of property on which is situated a one or two family residence.

The current definition of the term "parking lot" in VTL § 1192(7) was designed to legislatively overrule cases which had applied the VTL § 129-b "store or business establishment" test to determine whether a parking lot is a "parking lot" for purposes of VTL § 1192, see, e.g., People v. Williams, 66 N.Y.2d 659, 495 N.Y.S.2d 964 (1985); People v. McDonnell, 27 Misc. 3d 56, 901 N.Y.S.2d 451 (App. Term, 9th & 10th Jud. Dist. 2010); People v. Copeland, 132 Misc. 2d 990, 506 N.Y.S.2d 249 (Suffolk Co. Dist. Ct. 1986), replacing that test with a "capacity for the parking of four or more motor vehicles" test.

Proof that a parking lot constitutes a "parking lot" as defined in VTL § 1192(7) is an element of a VTL § 1192 charge. See People v. Whipple, 97 N.Y.2d 1, 7, 734 N.Y.S.2d 549, 552 (2001).

HOW ABOUT VEHICULAR MANSLAUGHTER WHICH HAS DWI AS AN ELEMENT?

People v. Harris
81 N.Y.2d 850, 597 N.Y.S.2d 620
(1993)

In People v. Harris, 81 N.Y.2d 850, 597 N.Y.S.2d 620 (1993), the defendant was convicted of, among other things, Vehicular Manslaughter in the 2nd Degree, in violation of Penal Law § 125.12, after a passenger in the vehicle he was driving (while intoxicated) died. Defendant argued that, since the driving at issue took place in a farmer's field, he did not operate the vehicle on a roadway encompassed by VTL § 1192(7), and thus that he did not violate VTL § 1192.

Since, on the date of the offense, a violation of VTL § 1192(2), (3) or (4) was an element of Vehicular Manslaughter, defendant claimed that he was improperly convicted thereof. The Court of Appeals disagreed, reasoning that:

> With the understanding that penal laws have different purposes than vehicle and traffic laws, we conclude the vehicular manslaughter statute applies to any person causing a death by driving under the influence of alcohol or drugs, *regardless of location*, even though there could be no separate punishment for such driving under Vehicle and Traffic Law § 1192 where the driving did not occur on public roads or other areas defined in that section.

Id. at 852, 597 N.Y.S.2d at 622 (emphasis added).

DO THE POLICE HAVE TO MIRANDIZE BEFORE REQUESTING A CHEMICAL TEST?

South Dakota v. Neville
459 U.S. 553, 103 S.Ct. 916
(1983)

In South Dakota v. Neville, 459 U.S. 553, 564 n.15, 103 S.Ct. 916, 923 n.15 (1983), the Supreme Court held that "[i]n the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of Miranda." See also id. at 564, 103 S.Ct. at 923 ("We hold . . . that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination"); People v. Berg, 92 N.Y.2d 701, 703, 685 N.Y.S.2d 906, 907 (1999) ("It is . . . settled that Miranda warnings are not required in order to admit the results of chemical analysis tests, or a defendant's refusal to take such tests"); People v. Kates, 53 N.Y.2d 591, 594, 444 N.Y.S.2d 446, 448 (1981) ("Taking a driver's blood for alcohol analysis does not call for testimonial compulsion prohibited by the Fifth Amendment"); People v. Thomas, 46 N.Y.2d 100, 103, 412 N.Y.S.2d 845, 846 (1978); People v. Craft, 28 N.Y.2d 274, 321 N.Y.S.2d 566 (1971); People v. Boudreau, 115 A.D.2d 652, ___, 496 N.Y.S.2d 489, 491 (2d Dep't 1985); Matter of Hoffman v. Melton, 81 A.D.2d 709, ___, 439 N.Y.S.2d 449, 450-51 (3d Dep't 1981); People v. Haitz, 65 A.D.2d 172, ___, 411 N.Y.S.2d 57, 60 (4th Dep't 1978); People v. Dillin, 150 Misc. 2d 311, ___, 567 N.Y.S.2d 991, 992 (N.Y. City Crim. Ct. 1991).

HOW ABOUT MIRANDA WARNINGS BEFORE FIELD SOBRIETY TESTS?

Schmerber v. California
384 U.S. 757, 86 S.Ct. 1826
(1966)

In Schmerber v. California, 384 U.S. 757, 761, 86 S.Ct. 1826, 1830 (1966), the Supreme Court held that the Fifth Amendment protects a defendant only from being compelled to either testify against himself or herself "or otherwise provide the State with evidence of a testimonial or communicative nature." See also People v. Hager, 69 N.Y.2d 141, 142, 512 N.Y.S.2d 794, 795 (1987) ("Evidence is 'testimonial or communicative' when it reveals a person's subjective knowledge or thought processes").

In Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638 (1990), the Court addressed the issue of "whether various incriminating utterances of a drunken-driving suspect, made while performing a series of sobriety tests, constitute testimonial responses to custodial interrogation for purposes of the Self-Incrimination Clause of the Fifth Amendment." 496 U.S. at 584, 110 S.Ct. at 2641. The defendant in Muniz was asked to perform various tests both at a roadside stop and later after he was arrested and transported back to the police station.

The Supreme Court held that Muniz's response to the question "Do you know what the date was of your sixth birthday?" was testimonial:

> When Officer Hosterman asked Muniz if he knew the date of his sixth birthday and Muniz, for whatever reason, could not remember or calculate that date, . . . Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful). The content of his truthful answer supported an inference that his mental faculties were impaired, because his assertion (he did not know the date of his sixth birthday) was different from the assertion (he knew the date was (correct date)) that the trier of fact might reasonably have expected a lucid person to provide. Hence, the incriminating inference of impaired mental faculties stemmed, not just from the fact that Muniz slurred his response, but also from a testimonial aspect of that response.

Id. at 598-99, 110 S.Ct. at 2649.

By contrast, the results of physical performance tests are not testimonial. As a result, they do not implicate the 5th Amendment, and thus need not be preceded by Miranda warnings. See, e.g., id. at 592, 110 S.Ct. at 2645 ("Under Schmerber and its progeny, . . . any slurring of speech and other evidence of lack of muscular coordination revealed by Muniz's responses to Officer Hosterman's direct questions constitute nontestimonial components of those responses"); People v. Berg, 92 N.Y.2d 701, 703, 685 N.Y.S.2d 906, 907 (1999) ("It is settled that Miranda warnings are not required to allow the results of field sobriety tests into evidence"); id. at 705, 685 N.Y.S.2d at 908-09 ("Results of field sobriety tests such as the horizontal gaze nystagmus, walk and turn and one-leg stand are not deemed testimonial or communicative because they 'do not reveal a person's subjective knowledge or thought processes but, rather, exhibit a person's degree of physical coordination for observation by police officers.' Responses to such tests incriminate an intoxicated suspect 'not because the tests [reveal] defendant's thoughts, but because [defendant's] body's responses [differ] from those of a sober person.' Thus, the results of such tests may be introduced despite the failure of the police to administer Miranda warnings") (citations omitted); People v. Jacquin, 71 N.Y.2d 825, 826, 527 N.Y.S.2d 728, 729 (1988) ("Performance tests need not be preceded by Miranda warnings and, generally an audio/visual tape of such tests, including any colloquy between the test-giver and the defendant not constituting custodial interrogation, is admissible"); People v. Hager, 69 N.Y.2d 141, 142, 512 N.Y.S.2d 794, 795 (1987).

Regardless of whether the results of sobriety tests are testimonial or not, where such tests are performed in the "field" the defendant is generally not yet in custody -- which is a further reason why Miranda warnings would not be required. See, e.g., Pennsylvania v. Bruder, 488 U.S. 9, 10-11, 109 S.Ct. 205, 206-07 (1988); Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 3150 (1984) ("The . . . noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of Miranda"). See also People v. Bennett, 70 N.Y.2d 891, 893-94, 524 N.Y.S.2d 378, 380 (1987); People v. Archer, 137 A.D.3d 449, ___, 25 N.Y.S.3d 873, 873 (1st Dep't 2016); People v. Brown, 107 A.D.3d 1305, ___, 968 N.Y.S.2d 224, 226 (3d Dep't 2013); People v. Myers, 1 A.D.3d 382, ___, 766 N.Y.S.2d 581, 582 (2d Dep't 2003); People v. Milo, 300 A.D.2d 680, ___, 753 N.Y.S.2d 90, 91 (2d Dep't 2002); People v. Hasenflue, 252 A.D.2d 829, ___, 675 N.Y.S.2d 464, 466 (3d Dep't 1998); People v. McGreal, 190 A.D.2d 869, ___, 593 N.Y.S.2d 868, 869 (2d Dep't 1993); People v. Hampe, 181 A.D.2d 238, ___, 585 N.Y.S.2d 861, 863 (3d Dep't 1992); People v. McAleavey, 159 A.D.2d 646, ___, 553 N.Y.S.2d 38, 38-39 (2d Dep't 1990); People v. Mason, 157 A.D.2d 859, ___, 550 N.Y.S.2d 432, 433 (2d Dep't 1990); People v.

Fiorello, 140 A.D.2d 708, ___, 529 N.Y.S.2d 27, 28 (2d Dep't 1988); People v. Mathis, 136 A.D.2d 746, ___, 523 N.Y.S.2d 915, 916 (2d Dep't 1988); People v. Brown, 104 A.D.2d 696, ___, 480 N.Y.S.2d 578, 579 (3d Dep't 1984); People v. O'Reilly, 16 Misc. 3d 775, ___, 842 N.Y.S.2d 292, 296 (Suffolk Co. Dist. Ct. 2007). Cf. People v. Norton, 135 A.D.2d 984, 522 N.Y.S.2d 958 (3d Dep't 1987); People v. Benson, 114 A.D.2d 506, ___, 494 N.Y.S.2d 727, 728 (2d Dep't 1985).

DOES THE DEFENDANT HAVE A RIGHT TO AN ADDITIONAL CHEMICAL TEST?

VTL § 1194(4)(b) (formerly VTL § 1194[8]) provides:

> (b) Right to additional test. The person tested shall be permitted to choose a physician to administer a chemical test in addition to the one administered at the direction of the police officer.

This right is statutory (*i.e.*, not constitutional) in nature. People v. Finnegan, 85 N.Y.2d 53, 59, 623 N.Y.S.2d 546, 549 (1995). See also People v. Alvarez, 70 N.Y.2d 375, 381, 521 N.Y.S.2d 212, 215 (1987).

In Finnegan, *supra*, the Court of Appeals held that:

> The simple, straightforward declaration of Vehicle and Traffic Law § 1194(4)(b) is that defendants are entitled to their own additional chemical test. The statute is starkly silent as to any implementary duties imposed on the law enforcement personnel as to notice or to direct assistance in obtaining an independent chemical test. . . . The statutory right is the defendant's and so is the responsibility to take advantage of it.
>
> We hold, therefore, that law enforcement personnel are not required to arrange for an independent test or to transport defendant to a place or person where the test may be performed. Of course, the police should not impede arrested individuals from exerting or accomplishing their statutory prerogative. The authorities should even assist persons in custody with appropriate advice and communication means, e.g., a telephone call opportunity. On the other hand, we have settled the general question that the police have no affirmative duty to gather or help gather evidence for an accused.

85 N.Y.2d at 58, 623 N.Y.S.2d at 548-49 (citations omitted).

CAN A POLICE OFFICER "RUN" A PERSON'S LICENSE PLATE FOR NO REASON?

People v. Bushey
29 N.Y.3d 158, 53 N.Y.S.3d 604
(2017)

To ensure the safety of our roads, a police officer may run a license plate number through a government database to check for any outstanding violations or suspensions on the registration of the vehicle. We hold that such a check, even without any suspicion of wrongdoing, is permissible, and does not constitute a search. We further hold that information obtained indicating the registration of the vehicle is in violation of the law as a result of this check may provide probable cause for the officer to stop the driver of the vehicle.

UNSAFE START

People v. Riggs
60 Misc. 3d 817, 80 N.Y.S.3d 649
(Rochester City Ct. 2018)

At about 2:34 a.m. on March 18, 2018, Rochester Police Officer Mary Barnes was traveling in her patrol car westbound on Monroe Avenue in Rochester, New York, approaching Meigs Street. At that time in the morning, the bars in that area had just closed, and several pedestrians were in the vicinity.

As Officer Barnes neared the intersection of Monroe Avenue and Meigs Street, the stop light at the intersection turned red. After the light changed, Officer Barnes heard the screeching of tires coming from a Subaru facing northbound that had been stopped at the intersection on Meigs Street before the light turned green. She then saw the car accelerate through the intersection. * * *

The People argue that based on her observations, the police officer had probable cause to stop defendant's vehicle for

violating [VTL] § 1162 that provides, "No person shall move a vehicle which is stopped . . . unless and until such movement can be made with reasonable safety." The officer testified that she stopped defendant's car solely because she heard defendant's automobile's tires screeching as it drove through the intersection from its stopped position, and saw the vehicle accelerate. She also testified that she believed that when defendant's car accelerated, it was going at an unreasonable speed. She acknowledged, however, that she was neither trained in the visual estimation of a motor vehicle's speed nor used an electronic speed detector. Given that [a] every vehicle accelerates from a stopped position, [b] there was no evidence that defendant was driving in excess of the legal speed limit, [c] there was no evidence of any hazardous driving conditions, and [d] there was no evidence that the car was out of control, the Court does not credit the police officer's assertion that the car's speed through the intersection was unreasonable.

"HYSTERICAL" WOMAN STOP

People v. Cator
159 A.D.3d 1583, 72 N.Y.S.3d 736
(4th Dep't 2018)

In February 2016, an Ontario County Sheriff's Deputy drove to defendant's home to discuss a matter unrelated to this case. As the deputy pulled onto defendant's street, he observed an "hysterical" woman waving and pointing at a black sedan that was entering the roadway from a driveway. Without speaking to her, the deputy activated the overhead lights of his patrol vehicle and stopped the black sedan. Its driver, defendant, subsequently failed a field sobriety test and made statements to another officer, and a blood draw indicated that he was intoxicated. Thereafter, defendant was indicted on two counts of aggravated [DWI], and one count each of [DWI] and endangering the welfare of a child.

Contrary to the People's contention, County Court properly suppressed the physical

evidence and statements. The police may stop a vehicle "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." We conclude that the actions of the "hysterical" woman, without more, did not provide the deputy with reasonable suspicion to justify the stop of the vehicle.

(Citations omitted).

WHEN CAN A POLICE OFFICER "STOP" A PARKED VEHICLE?

People v. Noble
154 A.D.3d 883, 63 N.Y.S.3d 401
(2d Dep't 2017)

On September 28, 2014, at approximately 5:30 a.m., Police Officer Evan Murtaugh was on patrol and driving northbound on Route 9A in the Town of Ossining in a marked police vehicle when he noticed a car parked on the right side of the road. The car's engine was running and the headlights were on, but the taillights were off. After pulling over behind the car, Officer Murtaugh approached the driver's side of the car and observed the defendant, who was alone in the vehicle and either asleep or unconscious, behind the wheel. Officer Murtaugh banged on the window with his hands and flashlight to get the defendant's attention. After between 30 and 45 seconds, the defendant awakened, looked in Officer Murtaugh's direction, and "floored the accelerator," causing the engine to increase the speed of its revolutions. The defendant then attempted to shift the car into gear, at which point Officer Murtaugh opened the car door, which was unlocked, leaned inside, and turned off the ignition. . . . The defendant was charged with, inter alia, [DWI] and [AUO 1st]. * * *

By reaching into the defendant's vehicle and turning off the ignition, Officer Murtaugh forcibly stopped the defendant, thus implicating the constitutional protections against unreasonable searches and seizures.

A forcible stop is not permitted unless there

is a reasonable suspicion that an individual is committing, has committed, or is about to commit a crime. In denying those branches of the defendant's omnibus motion which were to suppress his statements and evidence of his refusal to submit to a chemical test on the ground that Officer Murtaugh was permitted to forcibly stop the defendant on the basis of merely a founded suspicion that criminal activity was afoot, the hearing court erred.

EXHIBIT A

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

EDWARD J. TRACY,

DETERMINATION

a Justice of the Moreau Town Court, Saratoga County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission

Cade & Saunders, PC (by Larry J. Rosen) for Respondent

The respondent, Edward J. Tracy, a justice of the Moreau Town Court, Saratoga County, was served with a Formal Written Complaint dated April 30, 2001, containing two charges. Respondent filed an answer dated June 6, 2001.

On June 26, 2001, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On November 8, 2001, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Moreau Town Court since 1986. He is not a lawyer. He has attended and successfully completed all required training sessions for judges.

As to Charge I of the Formal Written Complaint:

2. In the summer of 1999, respondent reported to the state police that a rock had been thrown against the front door of his residence, that various objects had been thrown at his house over the past two years, and that respondent believed that the perpetrators were three youths – Reagan Moon, Brian Varney and Michael Christon – or their friends who were angry about respondent's sentences. In September and October 1999, the police questioned Brian Varney and Michael Christon, who denied involvement in the vandalism. The state police closed their investigation of respondent's complaints in

in October 1999 without arresting anyone, but respondent continued to believe that the three youths were responsible.

3. As set forth on the attached Schedule A, in 1999 and 2000, respondent failed to disqualify himself and presided over and disposed of numerous cases pertaining to defendants Reagan Moon, Brian Varney and Michael Christon, notwithstanding his belief that these defendants had been involved in vandalism to respondent's residence. During the period, respondent frequently stated to his court clerk that he intended to sentence the defendants to maximum fines, and, in fact, respondent frequently did so.

4. In October 1999, while presiding over charges against Reagan Moon, respondent stated that he had seen Mr. Moon near respondent's house, and upon learning that Mr. Moon's driver's license had been suspended, respondent asked Mr. Moon, "So, I won't have to listen to you drive by my house at one or two in the morning, right?"

5. On May 24, 2000, in sentencing Mr. Moon in connection with traffic charges, respondent advised Mr. Moon to cease his action, and added that Mr. Moon knew what he meant. Respondent told Mr. Moon to "stop the nonsense and grow up," thereby conveying the impression that respondent was addressing the alleged actions of Mr. Moon at respondent's home.

As to Charge II of the Formal Written Complaint:

6. In or about January or February 2000, respondent publicly announced to prosecutors, defense attorneys and a newspaper reporter that any defendant convicted of Driving While Intoxicated or Driving While Ability Impaired By Alcohol, whose blood alcohol test showed a level of .15 percent or greater, would be sentenced to jail and a maximum fine. Respondent's remarks were published in a newspaper account on February 3, 2000. Thereafter, respondent followed this "policy" until the Commission questioned respondent about making such an announcement about future action on cases and failing to consider each case on its merits.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(4), 100.3(B)(6) and 100.3(E)(1)(a)(i) of the Rules Governing Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

A judge must disqualify himself or herself in matters in which the judge's impartiality might reasonably be questioned. This includes matters in which the judge has a personal bias concerning a party, or the appearance of such bias. Sections 100.2(A) and 100.3(E)(1)(a)(i) of the Rules Governing Judicial Conduct; Matter of Van Buskirk, 1990 Ann Report of NY Commn on Jud Conduct 174; Matter of Lindell-Cloud, 1996 Ann Report of NY Commn on Jud Conduct 91. In view of respondent's belief that three

youths were involved in acts of vandalism to respondent's residence, it was improper for respondent to preside over numerous cases involving these defendants just months after he had reported his suspicions to the police. Respondent's comments on two occasions while presiding over Mr. Moon's cases in which he alluded to Mr. Moon's alleged actions at respondent's home further conveyed the appearance that respondent was biased and underscore why he should not have presided over the defendants' cases.

Respondent compounded his misconduct by making statements to his court clerk indicating that he intended to give the maximum fines to the three defendants when they appeared before him, and then by frequently doing so. Respondent's statements further demonstrate his partiality and strongly suggest that his sentences in the defendants' cases were not decided on the merits, but were predetermined according to the judge's bias.

Respondent's public announcement of a "policy" concerning the strict sentence he would impose on all defendants in certain drunk-driving cases was highly improper. Such a pronouncement is inconsistent with the role of a judge in our legal system, which is to apply the law in each case in a fair and impartial manner (Sections 100.2[A] and 100.3[B][1] of the Rules). While the expression of such a blanket "policy" against drunk drivers may pander to popular sentiment that all such defendants should be treated harshly, respondent's words conveyed the appearance that he would not, and did not, consider each case individually on the merits, after a fair hearing, as he is required to

do. Judicial discretion, which is at the heart of a judge's powers, is nullified when a judge imposes a "policy" that will dictate sentences in future cases. In the exercise of discretion, respondent may impose any sentence permitted by law in such cases, but only after considering the facts of each case and affording each defendant an opportunity to be heard according to law (*see* Section 100.3[B][6] of the Rules). Public confidence in the impartiality and independence of the judiciary is diminished by such statements.

By reason of the foregoing, the Commission determines that the appropriate sanction is censure.

Mr. Berger, Judge Marshall, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Peters, Mr. Pope and Judge Ruderman concur.

Judge Luciano was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: November 19, 2001

Henry T. Berger, Esq., Chair
New York State
Commission on Judicial Conduct