

People v Primmer

2011 NY Slip Op 33581(U)

November 21, 2011

Supreme Court, Wayne County

Docket Number: 11-73

Judge: Dennis M. Kehoe

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STATE OF NEW YORK
COUNTY COURT COUNTY OF WAYNE

PEOPLE OF THE STATE OF NEW YORK

-vs-

GREGORY N. PRIMMER,

Defendant

DECISION
AND
ORDER

Ind. No. 11-73

Wayne County District Attorney
Jacqueline McCormick, Esq., Assistant District Attorney
For the People

Fiandach & Fiandach
Michael W. McNelis, Esq., of Counsel
Defendant

The Defendant Gregory N. Primmer has been charged with one count of Driving While Intoxicated as a Felony in violation of §§1192(3) and 1193(1)(c)(I) of the Vehicle and Traffic Law, and one count of Reckless Driving in violation of §1212 of the Vehicle and Traffic Law. A hearing was held to determine whether there was probable cause for the Defendant's arrest, and whether the Defendant's statements, if any, together with evidence as to his refusal to submit to a chemical test, are admissible at trial.

The evidence presented at the hearing consisted of the testimony of

three witnesses: Jason W. Allen, an off-duty officer employed by the Irondequoit Police Department; Deputy Cale Flora, employed by the Wayne County Sheriff's Department; and Deputy Matthew Hilkert, employed by the Wayne County Sheriff's Department. Based upon the credible testimony of the witnesses, the Court issues the following findings of fact and conclusions of law:

1) On March 31, 2011, at approximately 11:15 P.M., Officer Allen was traveling eastbound in a private vehicle on Route 104 in the Town of Ontario, New York, when he observed an older red pick-up truck pass through a red light and continue eastbound on Route 104.

2) Officer Allen testified that he observed the truck swerving back and forth and tailgating the vehicle in front of it.

3) The truck then made an erratic left turn through multiple lanes of traffic, almost striking the guardrails on both sides of the road, and then proceeded north in the southbound lane of Knickerbocker Road, at which time Officer Allen lost sight of the vehicle.

4) Officer Allen proceeded to call 911 at 11:18 P.M. and gave the operator a description of the vehicle as well as its license plate number. Officer Allen testified that he had the vehicle clearly within his sight until the

truck proceeded north on Knickerbocker Road. While the two vehicles were traveling parallel, the officer was able to identify the driver as a white male and as the sole occupant of the vehicle.

5) Officer Allen's observations were relayed to Deputy Hilkert, who was on road patrol, by the 911 operator at approximately 11:22 P.M. Deputy Hilkert proceeded northbound on Knickerbocker Road and turned eastbound on Lake Road in the direction of the address on First Avenue which appeared on the truck's registration. Deputy Hilkert testified that he observed "a flash of taillights" traveling in the direction of First Avenue. Deputy Hilkert proceeded to turn onto the horseshoe-shaped road and drove to 2143 First Avenue. (The Court here notes that Deputy Hilkert testified at one point that he arrived at the Defendant's residence at 12:36 A.M. However, taken in the context of other testimony from the witnesses, it appears clear that the Deputy arrived at the residence at 11:36 P.M.)

6) When he arrived at the residence, Deputy Hilkert testified that he observed a truck matching the description of the suspect vehicle, with a plate displaying the license number he had been given by dispatch. The deputy also testified that, as he walked by the truck, he noticed a "pinging" sound emitted from the truck, indicating to him that the truck had just been

driven. He then spotted a white male standing on the landing at the door of the residence, attempting to place his key in the door. There were no lights on in the house.

7) Deputy Hilkert testified that the Defendant appeared dazed, disheveled and flushed, that he smelled of alcohol, that he could not locate his identification, that he staggered and that he appeared to have urinated in his pants. The Defendant refused to answer any of the deputy's questions and refused to participate in any field sobriety tests.

8) Based upon his observations of the Defendant, Deputy Hilkert determined that the Defendant was intoxicated, and based on the surrounding circumstances, he placed the Defendant under arrest.

9) Deputy Hilkert proceeded to handcuff the Defendant and to transport him to the Ontario substation. The witness testified that the ride to the station lasted approximately 7 minutes.

10) At the substation, the witness confirmed the Defendant's identity from the documents contained in his wallet, which was located in his back pocket. They were met at the substation by Deputy Flora, who had been dispatched to the station to administer a breath test to the Defendant.

11) Deputy Hilkert testified that he proceeded to read the DWI refusal warnings from a card to the Defendant. The Defendant said he would not take the test and asked to speak to his lawyer, whom he called from his cell phone. The deputy then read the warnings to the Defendant a second time, and the Defendant again refused to take the test.

12) Deputy Flora testified that his only contact with the Defendant took place at the Ontario substation. He confirmed that he witnessed Deputy Hilkert read the DWI warnings from a card to the Defendant, both before and after the Defendant spoke with his lawyer on his cell phone. On each occasion he testified that the Defendant refused to take a breath test.

13) The Defendant was advised as to his Miranda warnings by Deputy Hilkert at 1:08 A.M. on April 1, 2011.

14) Having considered the testimony of the three witnesses as set forth above, the Court concludes as follows:

A) Deputy Hilkert had probable cause to place the Defendant under arrest outside his residence, based upon the information provided by Officer Allen and relayed to him by the 911 operator, and based upon his observations of the truck and of the Defendant outside his home.


B) The initial conversation between Deputy Hilkert and the Defendant was investigatory in nature and did not require the administration of *Miranda* warnings.

C) Deputy Hilkert properly advised the Defendant as to the DWI warnings on two occasions, and the Defendant persisted in his refusal to submit to a breath test. The Defendant was given the opportunity to speak with an attorney by telephone during this process. Therefore the evidence regarding the circumstances surrounding the Defendant's refusal is admissible at trial.

D) Any statements which may have been made by the Defendant between the time he was taken into custody at the residence, and the time he was advised of his *Miranda* rights, would be inadmissible, other than those statements made in connection with his refusal of the test.

This Decision constitutes the Order of the Court.

Dated: November 21, 2011
Lyons, New York



Honorable Dennis M. Kenoe
County Court Judge