

At a regular term of the Justice Court,
Town of Riverhead, New York, held at
the Courthouse thereof, 210 Howell Avenue,
Riverhead, New York, on the 25th day of
October, 2017

P R E S E N T:

ALLEN M. SMITH
TOWN JUSTICE

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PEOPLE OF THE STATE OF NEW YORK

against

Docket No. 2014-TRF-2608

DECISION AND ORDER

R [REDACTED] M [REDACTED]

Defendant.

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Upon reading and filing the Notice of Motion, dated May 26, 2017; the affirmations of Donna Aldea dated May 26, 2017 and Eric Sachs Esq. dated May 1, 2017 in support of the motion; the Affirmation of Sean E. Buckley, Esq. dated July 15, 2017 in opposition to the motion together with all other papers and proceedings had herein it is decided as follows:

Defendant's motion seeks the following relief:

1. Granting Defendant's motion for a trial order of dismissal on the grounds that the People's proof of VTL §1192(2) was legally insufficient;
2. Granting Defendant's motion for a mistrial on the basis of prejudicial prosecutorial misconduct on summation;
3. Granting Defendant's motion to set aside the verdict pursuant to CPL §330.30(1) on the basis of the errors of law listed above;
4. Granting Defendant's motion to set aside the verdict pursuant to CPL §330.30(2) on the basis of juror misconduct or improper influence of jurors which may have affected a substantial right of the Defendant; and,
5. Granting such other relief with this Court deems just and proper.

The Defendant was found guilty by a jury of violating Section 1192(2) of the Vehicle and Traffic Law.

The motion pursuant to CPL Section 330.30(1) seeks to set aside the verdict on the grounds that the prosecution's comments during summation were improper. Defense moved a mistrial after the close of the People's summation. The Court reserved decision electing to allow the jury to render its verdict. The instant motion can be considered a renewal of the Defense motion at trial or a motion pursuant to CPL Section 330.30.

A prosecutor's comments during summation referencing matters not in evidence can result in the granting of Defendant's motion. People v. Brown, 256 A.D.2d 414; 682 N.Y.S.2d 229.

There is a line between inference and conjecture and between legitimate deduction and unregulated suspicion. People v. Aken, 217 N.Y. 532; 112 N.E. 380. This line may not be crossed in summation.

In this trial the Assistant District Attorney addressed the jury in summation in part as follows:

"So, don't just focus on one thing. We are talking about the totality. All of these factors, I submit most certainly leads to the conclusion that the defendant was intoxicated.

He was then brought back to headquarters where he was asked to submit to a chemical test.

He was stopped at 9:20, brought back to headquarters, asked to submit to a chemical test.

If you recall, Trooper Zawol said he didn't respond right away. He was deliberating for roughly 40 minutes, 30 to 40 minutes as to whether to take the test or not.

Why? I submit to you that he was stalling, waiting just a little bit longer, hoping that that BAC drops just enough.”

Not every improper comment made by the prosecuting attorney during the course of closing arguments warrants reversal of the underlying conviction. People v. Wright, 133 A.D.3d 1097 (2015) citing People v. Forbes, 111 A.D.3d 1154; 975 N.Y.S.2d 490 (2013).

In this case like People v. Wright, the proof of the Defendant’s guilt is not overwhelming. Therefore, did the prosecutor’s statement in summation focus the jury’s assessment of the Defendant’s blood alcohol content on a false premise not in the record?

The Assistant District Attorney’s comments in summation put before the jury the concept of reverse extrapolation. The theory of reverse extrapolation is the process by which an expert, taking into consideration, among other things an individual’s known BAC at a particular point in time renders an opinion as to the individual’s BAC at an earlier point in time. Assuming the expert in question is a qualified and a proper foundation has been laid for such opinion reverse extrapolation may be admitted. People v. Menegan, 107 A.D.3d 1166; 967 N.Y.S.2d 461 (2013).

The people argue that evidence of reverse extrapolation was admitted in the testimony of Defendant’s witness Jan Semenoff. The witness qualified as an expert in the operation of breath testing machines. Unlike the fact pattern in People v. Menegan, Mr. Semenoff is not a doctor.

Mr. Semenoff testified as an expert on the breath test device(s) and to field sobriety tests. Mr. Semenoff did not testify as to the science of physiology. There was no foundation laid as to the science of physiology. When asked about a post absorptive phase, Mr. Semenoff testified “...we have not talked about (sic) in the examination in chief at all” (transcript page illegible)

The absorption and elimination of alcohol is a two way street. The argument can be made that a motorist’s blood alcohol content has gone up and/or down. See Handling the DWI case in New York Section 39.8 Gerstenzang (2016-2017). The study cited in Section 39.8 (Ibid) the author notes that the steeping effect becomes of great concern at or near the critical per se level.

The claimed blood alcohol level in this matter is .08. Hence the issue of the blood alcohol level was and is central to the jury's verdict of guilty to VTL Section 1192(2).

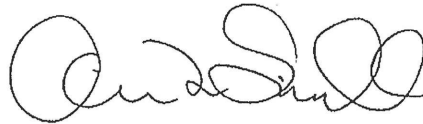
In this context it cannot be said that the prosecutor's comment about reverse extrapolation was harmless. Further it cannot be said that there is ample evidence of the Defendant's guilt beyond the blood alcohol reading.

The motion pursuant to CPL Section 330(1) to set aside the guilty verdict of violating VTL 1192(1) is GRANTED.

Except as provided herein the other motions made by the Defendant are DENIED.

This matter will be conferenced November 20, 2017

Dated: October 25, 2017
Riverhead, New York



ALLEN M. SMITH
Town Justice

To: Eric Sachs, Esq.
Sean Buckley, Esq.