DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT CRIMINAL PART 3

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THE PEOPLE OF THE STATE OF NEW YORK,

DOCKET NO. NA 06227/08

Plaintiff(s)

Present:

against

Hon. SUSAN T. KLUEWER

CORY LEWIS,

Defendant(s)

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The following named papers numbered 1 to 4 submitted on this motion on motion on October 17, 2008

	papers numbered
Notice of Motion and Affidavits Annexed	1-2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	3
Reply Affidavits	4

Defendant's single motion under two dockets for an order suppressing the results of a breath test, suppressing the results of a urine test, suppressing marijuana seized from his car, suppressing statements he made to police, affording his *Sandoval* and *Molineaux* relief, and granting him leave to make further motions is granted to the extent that:

1. the issues of whether any evidence should be suppressed as the product of an unlawful seizure or search, and if not, whether any of Defendant's statements should be suppressed as the product of custodial interrogation with benefit of *Miranda* warnings are set down for a pre-trial hearing; and

3. the permissible scope of cross-examination of Defendant concerning his past, should he elect to testify at trial, shall be determined at a hearing to be conducted immediately before trial, upon which the People shall notify Defendant of all specific instances of prior uncharged criminal, vicious or immoral conduct of which they have knowledge and which they intend to use at trial for impeachment purposes.

Defendant, Cory Lewis, whose date of birth is specified as 11/11/88, is

accused by long form information of false personation (*see* Penal Law § 190.23). He is accused by 10 simplified traffic informations of driving while impaired by the consumption of alcohol, driving while impaired by consumption of a drug, driving while impaired by a combination of alcohol and drugs, driving across hazardous markings, making an improper left turn, failing to stop at a stop sign (two counts), driving with an open container of alcohol in his vehicle, driving without a seat belt, and driving without a license (*see* Vehicle and Traffic Law §§ 1192[1], 1192[4], 1192[4-a], 1128[d], 1163[a], 1172[a], 1227, 1229[c][3], 509[1]). These documents are filed as a single accusatory instrument. Annexed to them is a "DWI SUPPORTING DEPOSITION AND BILL OF PARTICULARS." By it, Police Officer Michael A. Barbuck attests that, on March 8, 2008 at "3:50 hours" while he was present at a crime scene, he observed a black, 1999 Saab swerve across a double yellow pavement marking three times; that its left tires were approximately three feet into the opposing lane; that he followed the driver, who then executed an unsafe, wide left turn, narrowly missing a parked car; that the vehicle then passed two stop signs; that its brake lights did not illuminate; and that as he was conducting, a "VTL investigation," he noted that the driver was not wearing a seat belt. He thereby further attests that the driver rolled down his window as he approached; that the driver could not produce any identification; that the driver's eyes were pinkish and bloodshot; that he detected a moderate odor of an alcoholic beverage coming from the driver's mouth as he slurred his words; that the driver appeared confused "especially when I asked him for his name;" that the driver then made a statement about his driving, about whose car he was driving, about the fact that he did not have his wallet, and about what he had to drink; that he directed the driver to get out of the car for field sobriety testing; that he observed the driver balance himself against the car a number of times; that he appeared unsteady on his feet; that he exhibited eyelid tremors and "'cotton mouth;" that he (officer Barbuck) administered "SFST"and "PBT" examinations, "all of which exhibited [the driver's] intoxication and drug impairment;" that he searched and arrested the driver; that he warned the driver "of additional criminal consequences if he provided false pedigree information;" that the driver identified himself as Michael Shaughnessy with a November 11, 1988 birth date; that another officer conducted an "inventory search" of the Saab; that the other officer recovered two medium plastic bags containing marijuana from the Saab's center console; that the other officer also discovered a large glass pipe containing marijuana residue from the bottom of the driver's seat pocket; that he (Officer Barbuck) uncovered a small glass pipe; that after he placed the marijuana evidence on the dashboard of the police car, the driver made a statement about possessing and smoking marijuana; that he (Officer Barbuck) secured the Saab;

that a passenger, who was "also intoxicated," was taken home by cab; and that he and his fellow officer took the driver to police headquarters for processing. Officer Barbuck next attests that at "CTS," he again warned "the arrestee" of additional charges for misidentifying himself; that the arrestee consented to and took a breath test; that the reading was ".079% BAC;" that the arrestee consented to and took a urine test; that another officer asked the arrestee to sign a property receipt; that the arrestee signed his name as Cory Lewis; and that when confronted "with this fact" the arrestee stated "'Oh, I thought you wanted me to sign someone else's name." Defendant is charged by information filed under Docket Number 6228/08 with unlawful possession of marijuana (*see* Penal Law § 221.05). According to that accusatory instrument, marijuana was recovered "during a lawful search" incident to the Vehicle and Traffic Law stop giving rise to the charges filed under this docket.

There is no documentation other that accusatory instrument contained in the court file maintained for the case pending under Docket Number 6628/08. The People have, however, filed a "710.30" notice advising of their intention to offer evidence at trial of three statements. The place or places of these statements are not specified, but Defendant allegedly made them at, respectively, "353," "410" and "611." The first concerns the statement he is claimed have made, as indicated above, about, among other things, his driving. By the second, Defendant is claimed to have admitted to possessing and smoking marijuana. By the third, Defendant is alleged to have stated "Oh, I thought you wanted me to sign someone else's name." The People have also served "VDFs" by which they consent to what they call a "voluntariness – pre-arrest statements" hearing to determine whether Defendant's statements are the product of "classic coercion re: Defendant's 5th amendment rights only," but their consent is "*contingent* [emphasis in original] on no other hearings being necessary." They also make disclosure of certain documents, including inventories of items seized during the encounter, and field notes about Defendant's performance on the standard field sobriety tests. The latter indicates that Defendant failed the "HGN" test, that, on the one-leg-stand test, he put his foot down at 2, 6, 9, 11 and 17, that he skipped 15, and that he put his foot down at 20.

Defendant now moves for the above-specified relief. In support, he asserts that, on the date and at the time of the incident, he was driving within the designated lane markings, that at no time did he cross over those markings, that he was driving within the speed limit, that he signaled when making his turn, that he turned the car safely, that he did not make a "wide" turn, that he did not come

of evidence, that they have already turned over to Defendant a copy of his "rap sheet," and that they are continuing to investigate Defendant's prior bad acts and "will notify" Defendant of uncharged crimes and vicious acts that they intend to use at trial "immediately prior [thereto]."

Defendant in reply, among other things, repeats his assertions about the unlawfulness of the stop of his car and the ensuing police intrusions, urging that a pre-trial hearing is required. Insofar as the People oppose suppression of his statements on other than probable cause grounds, he notes that he is not required to come forward with attestations of fact in order to obtain a pretrial hearing.

While some of Defendant's assertions, particularly those with respect to his performance on the standard field sobriety tests, are "conclusory," his specific refutation of other events as they are set forth the accusatory documents and as the People adopt them on this motion mandate evidentiary examination of at least most of the levels of police intrusion involved in this case, including the search of Defendant's car. This is so whether it is characterized as an inventory search or as one conducted pursuant to the automobile exception to the warrant requirement (*see People v. Mendoza*, 82 NY2d 415, 604 NYS2d 922 [1993]*see also People v. Johnson*, 1 NY2d 252, 771 NYS2d 64 [2003]; *People v. Gala*, 80 NY2d 715, 594 NYS2d 689 [1993]; *and see People v. Ellis*, 62 NY2d 393 477 NYS2d 106 [1984]; *People v. Copeland*, 39 NY2d 986, 387 NYS2d 234 [1976]; *People v. Wilcox*, 198 AD2d 544, 603 NYS2d 199 [1993]; *People v. Watson*, 177 AD2d 676, 576 NYS2d 370 [2d Dept. 1991]; *People v. Rodriguez*, 122 AD2d 895, 505 NYS2d 936 [2d Dept. 1986]). Thus, whether any evidence should be suppressed, including the statements attributed to Defendant, must be determined after a pretrial hearing (*see* CPL 710.60[4]). Since that pretrial hearing will necessarily entail, at least to some extent, examination of, *e.g.*, the conduct of the standard field sobriety tests, thorough review of the entire encounter is called for (*see People v. Mendoza, supra*). Moreover, as the People should be well aware, the threshold for obtaining a hearing to determine *Miranda* and coercion issues is relatively easy to meet (CPL 710.60[3][b]; *see People v. Mendoza*, *supra*; *People v. Weaver*, 49 NY2d 1012, 429 NYS2d 399 [1980]; *People v. Ryan*, n.o.r., 2005 NYSlipOp 51132U [Nassau Dist Ct, July 14, 2005]), and whether the Defendant's claimed "*res gestae*" statements can be the product of improper, overbearing police conduct remains undeveloped in the record presently before me. The pretrial hearing noted above is thus warranted (*see People v. Mendoza*, *supra*).

Defendant's application for *Sandoval* relief is granted to the extent noted above (CPL 240.43; *see People v. Matthews*, 68 NY2d 118, 506 NYS2d 149 [1986]; *People v. Sandoval*, 34 NY2d 371, 357 NYS2d [1974]; *see also People v. Simpson*, 109 AD2d 461, 492 NYS2d 609 [1985]).

Defendant's request *Molineaux* for relief is denied without prejudice to an appropriate motion *in limine* should it become apparent that the People intend to rely on *Molineaux* evidence at trial.

Defendant's application for leave to make further motions is denied without prejudice to a properly grounded motion for specified relief.

So Ordered:

DISTRICT COURT JUDGE

Dated: November 26, 2008

CC: Honorable Kathleen Rice, District Attorney
Massimo & Panetta, P.C.

STK:blm