

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: December 6, 2012

104442

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THE PEOPLE OF THE STATE OF  
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

MEGEN A. MURPHY,

Appellant.

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Calendar Date: October 16, 2012

Before: Mercure, J.P., Rose, Lahtinen, McCarthy and  
Egan Jr., JJ.

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Brandon E. Boutelle, Public Defender, Elizabethtown (Angela M. Kelley of counsel), for appellant.

Kristy L. Sprague, District Attorney, Elizabethtown (Brian W. Felton of counsel), for respondent.

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Lahtinen, J.

Appeal from a judgment of the County Court of Essex County (Meyer, J.), rendered August 4, 2011, upon a verdict convicting defendant of the crime of driving while intoxicated and the traffic infractions of consumption or possession of alcohol in a motor vehicle on a highway and following too closely.

Defendant allegedly followed very closely behind and then passed in a no-passing zone an unmarked police vehicle operated by State Police Investigator Daniel Howard. Howard pulled her over and, when speaking to her, he detected an odor he suspected was alcohol. He was soon joined by State Trooper Todd Goff, who smelled alcohol and observed open alcoholic beverage containers

in defendant's vehicle. Goff administered field sobriety tests, which defendant failed. She was taken into custody and a chemical breath test, which was conducted about an hour after the initial stop, revealed a blood alcohol level of .10%. Defendant, who had a previous driving while intoxicated (hereinafter DWI) conviction within 10 years, was indicted for felony counts alleging per se and common-law DWI (see Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [c] [I]), as well as three traffic infractions. A jury acquitted on the per se DWI charge, but found her guilty of common-law DWI and two traffic infractions. Her sentence included a prison term of 1 to 3 years on the felony DWI count. Defendant now appeals contending that the People did not comply with CPL 710.30, County Court erred in admitting her breath test results into evidence, and her common-law DWI conviction was against the weight of the evidence.

We affirm. "[T]he purpose of CPL 710.30 is to inform a defendant that the People intend to offer evidence of a statement to a public officer at trial so that a timely motion to suppress the evidence may be made" (People v Rodney, 85 NY2d 289, 291-292 [1995]; see People v Wilhelm, 34 AD3d 40, 44 [2006]). Here, the People provided CPL 710.30 notice regarding statements made by defendant to police. At the Huntley hearing, Goff testified that when he was doing a pat-down of defendant, she made a statement to him to the effect that he was inappropriately touching her. This particular statement had not been included in the CPL 710.30 notice. After defendant objected, County Court permitted proof regarding the statement and ruled that it was a spontaneous statement. The statement was addressed at the Huntley hearing, defendant had an opportunity to challenge it, and the record supports County Court's ruling that it was spontaneous (see People v Richard, 229 AD2d 787, 789 [1996], lv denied 89 NY2d 928 [1996]). Further, it appears from the record that defendant's objection to this evidence was based on relevancy and not a failure to provide notice.

There was a proper foundation to admit the blood alcohol level results from the breath test administered to defendant. Breath test results are admissible where the People "establish that the machine is accurate, that it was working properly when the test was performed and that the test was properly

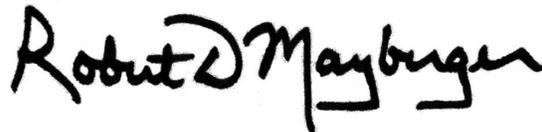
administered" (People v Campbell, 73 NY2d 481, 484 [1989]; see People v Boscic, 15 NY3d 494, 497 [2010]; People v Mertz, 68 NY2d 136, 148 [1986]; cf. People v Baker, 51 AD3d 1047, 1049 [2008]; People v Grune, 12 AD3d 944, 945 [2004], lv denied 4 NY3d 831 [2005]). The People presented proof establishing that the machine used for the test on defendant had been recently calibrated and was accurate, it was working correctly at the time of the test, and the test was properly administered.

Defendant's conviction of common-law DWI was not against the weight of the evidence. When addressing a weight of the evidence argument, we view the evidence in a neutral light, accord deference to the jury's assessment of credibility and "weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony" (People v Bleakley, 69 NY2d 490, 495 [1987] [internal quotation marks and citation omitted]; accord People v Romero, 7 NY3d 633, 643 [2006]). There were open alcoholic beverage containers in defendant's car and evidence that she had been drinking from one of the containers. The officers testified regarding the smell of alcohol on defendant. When she exited her vehicle she walked in a manner described by Goff as awkward. She reportedly responded belligerently to Goff at one point. Goff testified that he administered four field sobriety tests – a horizontal gaze nystagmus test, a walk and turn test, a one-leg stand test and a Romberg balance test. Significantly, defendant failed each of those tests. Although cross-examination revealed some discrepancies in the testimony of the police, the testimony was not incredible, and this created credibility issues for the jury (see People v Shaffer, 95 AD3d 1365, 1366 [2012]; People v D'Angelo, 244 AD2d 788, 789 [1997], lv denied 91 NY2d 890 [1998]). The fact that the jury acquitted defendant of the per se DWI count does not require the same result for the common-law DWI. Even disregarding the result of the breath test, there was ample evidence of her intoxication provided by the testimony of the police who dealt with her at the scene (see People v Carvalho, 174 AD2d 687, 688 [1991], lv denied 78 NY2d 1010 [1991]). Upon weighing and considering the evidence, we find that the jury's verdict finding defendant guilty of common-law DWI was not against the weight of the evidence.

Mercure, J.P., Rose, McCarthy and Egan Jr., JJ., concur.

ORDERED that the judgment is affirmed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger  
Clerk of the Court