DISTRICT COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
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THE PEOPLE OF THE STATE OF NEW YORK

- against -

NOTICE OF MOTION

Docket.#

Refer to: Hon. Judge Behar

----------X

S I R S :

PLEASE TAKE NOTICE that upon the annexed Affidavit of MICHAELANGELO MATERA, Esq., duly sworn to on the 6th day of February, 2004, the attorney of record for the defendant herein, and upon all pleadings and proceedings had heretofore, the undersigned will move this Court at Part D-46 to be held in and for the County of Suffolk, at the Courthouse located at 400 Carleton Avenue, Central Islip, New York, on the 25th day of February, 2004, at 9:30 in the forenoon of that day, or as soon thereafter as counsel may be heard:

I. For an Order dismissing this action in the interests of justice pursuant to C.P.L. §170.30(f),(g) and 170.40 as the complaint fails to state a crime with which the defendant can be charged;

II. For an order, in the alternative, pursuant to CPL § 710.20 (5), suppressing any evidence obtained by the illegal taking of the defendant's blood for failure to comply with the rules and procedures set forth in Vehicle and Traffic Law §1194 (3);

III. For an Order, pursuant to C.P.L. 710.20 (3), 710.40 and 60.45 (1) and (2), suppressing any testimony regarding a statement allegedly made by the defendant if it is

to be offered as inculpatory evidence at trial, or in the alternative, directing that a hearing be held as to the admissibility of such statement(s);

IV. For an Order, pursuant to the Fourth, Fifth and Sixth Amendments of the Constitution of the United States and C.P.L. 710.20 (1), (3), (4) and (6) and 710.40, suppressing any testimony regarding statement or property to be offered as evidence at trial, or in the alternative, directing that a hearing be held as to the admissibility of any such testimony and property;

V. For an Order precluding the People from introducing at trial any evidence of Miss xxxx's prior convictions or bad acts, if any, or in the alternative, that a hearing be held to determine the admissibility of such convictions or acts;

VI. Granting reasonable time for the defendant to make such additional motions as are predicated upon the People's responses to this Omnibus Motion, the Court's Decision on this Motion, or any further developments that should arise in this case.

Dated: Garden City, New York
February 6, 2004

Yours, etc.,

MATERA SILER & INGBER

_____
MICHAELANGELO MATERA
Attorneys for xxxxxx
1527 Franklin Avenue
Suite 301
Mineola, NY 11501
(516) 294-2666

TO: Judge Stephen M. Behar
Suffolk County District Court
400 Carleton Avenue
Central Islip, New York 11722

Suffolk County District Attorney's Office
ADA Douglas Byrne
400 Carleton Avenue
Central Islip, New York 11722

DISTRICT COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

THE PEOPLE OF THE STATE OF NEW YORK **AFFIDAVIT**

Dkt.#

- against -

Refer to: Hon. Judge Behar

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STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

MICHAELANGELO MATERA, Esq., being duly sworn, deposes and says:

That I am an attorney admitted to practice law in the State of New York, and am a partner in the law firm of MATERA SILER & INGBER, attorneys for the defendant in connection with the above-captioned action and, as such, am fully familiar with the proceedings therein;

That this Affidavit is submitted in support of the within Motion, which seeks the aforementioned relief;

That the sources of your affirmant's information and belief are the Court records, the records on file in my office, official reports and records, discussions with the Assistant District Attorney and Police Department, and conversations had with the defendant.

Miss xxxxxx was arrested on August 3, 2003, and charged with one count of Driving While Intoxicated, pursuant to Vehicle and Traffic Law §1192 (3).

I. MOTION TO DISMISS IN FURTHERANCE OF JUSTICE

C.P.L. '170.30(f) states that, " . . . [T]he local criminal court may, upon motion of the defendant, dismiss [the misdemeanor complaint] or any count thereof upon the

ground that: (f) [t]here exists some other jurisdictional or legal impediment to conviction of the defendant for the offense charged." In the instant matter, the misdemeanor complaint fails to state a crime for which the defendant can be charged since the Toxicologic Report completed after testing of the blood of the defendant reveals that she was not in fact intoxicated. The Report, a copy of which is annexed hereto as Exhibit "A", reveals that Miss Dominguez had a reading of .05%.

Therefore, the defendant respectfully requests that the misdemeanor complaint be dismissed in its entirety pursuant to C.P.L. '170.30(f),(g) as the charge is not legally sustainable, and pursuant to C.P.L. '170.40 which gives this Court discretion and permission to dismiss this case in furtherance of justice.

II. MOTION TO SUPRESS BLOOD EVIDENCE

The defendant further moves, pursuant to CPL §710.20 (5), to suppress any and all evidence resulting from the withdrawal of her blood since the administration of the test did not comply with the provisions set forth in Vehicle and Traffic Law §1194 (3).

Vehicle and Traffic Law §1194 (3) deals with compulsory court ordered chemical tests. VTL §1194 (3) states that, ". . . no person who operates a motor vehicle in this state may refuse to submit to a chemical test [of blood] for the purpose of determining the alcoholic and/or drug content of the blood *when* a court order for such chemical test has been issued in accordance with the provisions of this subdivision." (*emphasis added*) The statute goes on to state said provisions as follows:

> "When authorized. Upon refusal by any person to submit to a chemical test or any portion thereof as described above, *the test shall not be given* unless a police officer or a district attorney . . . *requests and obtains* a court order to compel a person to submit to a chemical test to determine the alcoholic or drug

> content of the person's blood upon a finding of reasonable cause . . . " (*emphasis added*) (VTL §1194 (3)(b))

In the instant matter, the officer clearly has not complied with the afore-mentioned provisions.

In the course of processing the arrest of Miss xxxxxx, the officer prepared and completed an "Alcoholic/Drug Influence Report", a copy of which is annexed hereto as Exhibit "B". Upon a review of the report, the Court will note that on the top right corner of the report, it states that the blood test was administered at Southside Hospital on August 3, 2003 at *5:27 a.m.* However, after being told for several months that there was not a court order to take the defendant's blood, counsel received a court order for the same on January 8, 2004, more than five months after the date of arrest. A copy of said order is annexed hereto as Exhibit "C". A review of the last page of said order reveals that the order was not issued by Judge Tschiember until *5:40 a.m.*, some thirteen minutes *after* the blood was taken from Miss Dominguez.

Additionally, annexed hereto as Exhibit "D" is a copy of the transcription of the application for the court order. Once again, on page eight of the transcription, it is made clear that Judge Tschiember did not issue the order to remove Miss xxxxxx's blood until 5:40 a.m. which is thirteen minutes after the blood was withdrawn.

Courts faced with similar situations where warrants were not in place at the time the invasion took place have routinely suppressed the fruits of these improper searches. They have reiterated the fact that procedures must be followed and that part of said procedures include reducing the order to writing. Courts have been mindful that to find otherwise would, "radically depart from a long, unbroken common-law tradition that a judicial fiat must be in writing before it can impinge upon important rights." (People v. Crandall, 108

AD2d 413, 416, 489 NYS2d 614, *See also*, People v. White, 133 Misc.2d 386, People v. McGrath, 135 AD2d 60) In the instant matter, the order was never issued at the time that the blood test was administered and therefore it is impossible for a written order to have been prepared at that same time.

In light of these facts, the defendant respectfully urges this Court to suppress any and all evidence resulting from the withdrawal of her blood pursuant to CPL §710.20 (5), since the administration of the test did not comply with the provisions set forth in Vehicle and Traffic Law §1194 (3).

III. SUPPRESSION OF STATEMENTS

The defendant moves to suppress any statement allegedly made by the defendant, wheresoever any such statement was taken in violation of her constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. (Miranda v. Arizona, 384 US 436; People v. Huntley, 15 NY2d 72) The alleged statements were obtained without obtaining intelligent and knowing waivers of the defendant's Miranda rights as there was no valid waiver of her right to remain silent or there was no valid indication that she actually understood her rights, considering the fact that she had just minutes before sustained significant injuries that would have rendered her comprehension of the warnings, if any were read to her, non-existent.

In the alternative, the defendant requests a Huntley hearing.

IV. SUPPRESSION OF STATEMENTS AND PROPERTY AS FRUITS OF AN ILLEGAL SEARCH AND SEIZURE OF DEFENDANT

The defendant moves to suppress any statement allegedly made by her as the result of

the unlawful seizure of hers person by police officers, in that, the defendant was forcibly detained by police officers without probable cause to arrest her and in violation of the Fourth and Fourteenth Amendments to the United States Constitution, in that the statements were the result of the seizure of her person.

The Officer placed the defendant under arrest based upon information received from an individual at the hospital who indicated that it was his belief that the defendant was intoxicated. As has already been mentioned, a review of the Toxicological Report, annexed hereto as Exhibit "A", the defendant was in fact not intoxicated, having a blood alcohol reading that was below the legal limit.

The Officer, in all of his paperwork never once mentions that he himself became aware of any indication of intoxication on the defendant and in fact, permitted her removal to the hospital without giving even the slightest indication that she was intoxicated and certainly never expressed any intention to place her under arrest.

Instead, the Officer chose to place the defendant under arrest without having any probable cause and as a result, allegedly obtained a statement from her. Clearly it is the case that without this unlawful arrest, there would never have been an alleged statement. As a result, the statement should be suppressed. (Dunaway v. New York, 442 US 200, 99 S.Ct. 2248, 60 L.Ed.2d 824; Wong Sun v. United States, 371 US 475, 83 S.Ct. 407, 9 L.Ed.2d 441)

Should this Court decide against suppression at this time, then the defendant would, in the alternative, request a hearing pursuant to Dunaway v. New York.

V. PRIOR CONVICTIONS OR BAD ACTS

Miss xxxxx may wish to testify on her own behalf. The People should be precluded from entering into evidence, either on their direct case or during cross examination, any prior arrests, convictions or prior bad acts of Miss Dominguez, should any exist, as the prejudicial effect of introducing such material far outweighs the probative value it might have. (People v. Sandoval, 34 NY2d 371, 314 NE2d 413, 357 NYS2d 849; People v. Ventimiglia, 52 NY2d 350) Additionally, it is requested that the People notify the defendant of all instances, if any, of prior uncharged bad acts which they intend to use at trial.

Should this Court decide against suppression at this time, then the defendant would, in the alternative, request a hearing pursuant to People v. Sandoval and People v. Ventimiglia.

VI. RESERVATION OF RIGHTS

Pursuant to C.P.L. §255.20(3), Miss xxxxxx reserves the right to make additional pretrial motions should such be necessary. She further reserves the right to amend or supplement this motion if that becomes necessary or appropriate in light of any disclosures by the People. Miss xxxxxx further reserves the right to request an adjournment after pre-trial hearings and to investigate information developed at said hearings. (*See,* People v. Peacock, 31 NY2d 907, 340 NYS2d 642)

The Defendant further submits that no prior application has been made for the relief requested herein.

WHEREFORE, it is requested that the foregoing Motions be granted, together with such other and further relief which, as to this Court, may seem just and proper.

DATED: February 6, 2004
Mineola, New York

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MICHAELANGELO MATERA