DISTRICT COURT OF THE COUNTY OF NASSAU
FIRST DISTRICT : CRIMINAL TERM, Part 8
----------X

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

EUGENE LI,

Defendant.

HON. ANDREW M. ENGEL

DECISION and ORDER

Docket No. 2014NA023862

----------X

Papers Submitted:
Notice of Motion.....1
Affirmation in Support.....2
Affirmation in Opposition.....3
Reply Affirmation.....4

On November 1, 2014 the Defendant was arrested and charged with driving while intoxicated *per se*, driving while intoxicated at common law, changing lanes unsafely and three (3) counts of failing to signal, all in violation of VTL §§ 1192(2), 1192(3), 1128(a) and 1163(a), respectively. On the morning of his arrest, while at the Central Testing Section of the Nassau County Police Department, the Defendant twice submitted to a chemical test of his breath. Those tests resulted in a reading of the Defendant's blood alcohol content ("BAC") as .11% and .12%.

The device used to test the Defendant's breath was an Intoxilyzer 5000EN, bearing serial number 68-013837. The simulator used in connection with the calibration of this device on the morning of the Defendant's tests was unit 3048; and, the simulator solution used in connection therewith was lot number 14180.

As part of their Voluntary Disclosure Form, and ultimately in response to the Defendant's demand therefor, the People provided the Defendant with, *inter alia*, an Intoxilyzer/Breathalyzer Maintenance Log for the device bearing number 013837, for the date of October 6, 2014, the Simulator Maintenance Log for unit 3048, for the dates of July 8, 2014.

August 25, 2014 and October 11, 2014, a 0.10% Simulator Solution Record for lot number 14180, dated August 6, 2014, and the breath cards from the two tests to which the Defendant submitted.

The People having previously indicating their unwillingness to provide same, by Notice of Motion dated April 30, 2015, the Defendant moved this court for an order compelling the People to provide him with:

> Any and all documents concerning the preparation and testing of the Simulator Solution Lot Number 14180, including the forensic method utilized in the production of the simulator solution i.e. standard operating procedures for the production of any and all simulator solutions produced and utilized in the testing of the Defendant's breath and the actual chromatograms (GC Data) of the headspace gas chromatography.

The People opposed that motion, arguing that the documents sought were beyond the scope of discovery required by CPL § 240.20, and that they did not possess the documents in question, which were in the possession of the New York State Police, who had tested the subject simulator solution.

By Decision and Order dated July 28, 2015 this court (Engel, J.) granted the Defendant's motion and ordered the People to disclose to the Defendant, and make available for inspection, photographing, copying or testing, to the extent they are in the possession or control of the District Attorney of Nassau County, the Nassau County Police Department, and/or the New York State Police, any and all documents concerning the preparation and testing of the Simulator Solution Lot Number 14180, including, but not limited to the actual chromatograms (GC Data) of the headspace gas chromatography. The People were to disclose such documentation on or before September 21, 2015.

The People having failed to comply with this court's order, the Defendant now moves for an order dismissing the accusatory instruments, or in the alternative, precluding the introduction at trial of evidence related to any breath tests administered on the

Defendant and issuing an adverse inference instruction in conjunction with the preclusion of such evidence. The Defendant argues that the documents in question are central to the very nature of the case against him and the People's failure to provide same inhibit his ability to challenge the results of the chemical breath tests performed. The Defendant further argues that the People's bad faith is clearly demonstrated by the fact that the documents in question have not been lost or destroyed and still exist; but, the People simply will not turn them over. In addition thereto, the Defendant seeks an order modifying the order of July 28, 2015, to include CPL § 240.40 as an additional statutory basis for discovery.

The People oppose the motion, arguing that the Defendant has failed to point to any prejudice he has suffered, or may suffer, by the People's failure to disclose the documents in question and, as such no sanctions should be imposed. The People further argue, as they did at the time of the Defendant's original motion, that the documents in question are in the possession of the New York State Police, who created said documents, and that the People are unable to obtain same from the New York State Police. The People further argue that they "have provided the defendant with numerous documents concerning the calibration and maintenance of the Intoxylizer used in this case" (*Witherell Affirmation* 10/9/15, ¶ 25) and that, coupled with the assurances of the New York State Police that the simulator solution used at the time of the Defendant's tests was properly prepared, this should be sufficient for the Defendant. The People also suggest that the Defendant should simply subpoena the documents in question from the New York State Police, while at the same time acknowledging that the State Police will move to quash such a subpoena as being an improper substitute for discovery.

BROADENING THE COURT'S ORDER OF JULY 28, 2015

The People are absolutely correct in suggesting that this branch of the Defendant's motion "is nothing more than a[n] [improper] motion to reargue this Court (*sic*) prior decision." (*Witherell Affirmation* 10/9/15, ¶ 28) The Defendant fails to identify any "matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR § 2221(d)(2) In fact, the Defendant never raised issues relating to CPL § 240.40(1)(c) at the time of the prior motion; and, it is improper for him to do so at this time.

This branch of the Defendant's motion is denied.

DISMISSAL, PRECLUSION AND/OR AND ADVERSE INFERENCE

The People's reliance on *People v. Santorelli*, 95 N.Y.2d 412, 718 N.Y.S.2d 696 (2000) and *Matter of County of Nassau v. Sullivan*, 194 A.D.2d 236, 606 N.Y.S.2d 249 (2nd Dept. 1993), as well as *People v. Washington*, 86 N.Y.2d 189, 630 N.Y.S.2d 693 (1995) is misplaced. Each of those cases are readily distinguishable from the issue presently before this court.

None of those cases involved the question of appropriate sanctions to be imposed pursuant to CPL § 240.40 for the People's failure to comply with a discovery order. *Santorelli*, *supra*., and *Washington*, *supra*. involved appeals following conviction, alleging *Brady*[1] and *Rosario*[2] violations, while *Sullivan*, *supra*. involved a motion to quash a subpoena, also raising *Brady* and *Rosario* issues. There is, however, a "distinction between discovery rules which permit a view of the opponent's evidence and those which relate to constitutionally guaranteed access to exculpatory information [*Brady*] or fundamental fairness through a review of any prior statement made by a witness [*Rosario*]." *People v. DaGata*, 86 N.Y.2d 40, 44, 629 N.Y.S.2d 186, 189 (1995)

---

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963)
[2] *People v. Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961), *reargd. den.* 9 N.Y.2d 908, 216 N.Y.S.2d 1025 (1964), *cert. den.* 368 U.S. 866, 82 S.Ct. 117 (1961)

Moreover, *People v. Santorelli, supra.*, involved documents created during a completely separate and independent pre-existing investigation being conducted by the FBI. The court therein specifically noted that "the FBI, [is] an agency not part of the New York State law enforcement chain" *People v. Santorelli, supra.* at 421, 718 N.Y.S.2d 696, 700 (2000) and is "an independent Federal law enforcement agency not subject to State control." *People v. Santorelli, supra.* at 420, 718 N.Y.S.2d 696, 700 (2000)

Similarly, *People v. Sullivan, supra.* involved nothing more than conjecture that the County Attorney's office possessed documents relating to a separate independent civil suit which might contain *Brady* material. There the court drew a very clear distinction between "the prosecutor, that is, the 'district attorney or ... other public servant who represents the people in a criminal action" *Matter of County of Nassau v. Sullivan, supra.* at 239, 606 N.Y.S.2d 249, 251 (2nd Dept. 1993) and the County Attorney's Office, which was handling the civil matter. Moreover, as is germaine to the issues presently before this court, the Appellate Division recognized that "it is entirely reasonable to infer that the materials to which the local prosecutor has 'immediate access' (citation omitted) would normally include those prepared by law enforcement agencies in connection with criminal investigations ...." *Matter of County of Nassau v. Sullivan, id.* at 239, 606 N.Y.S.2d 249, 251 (2nd Dept. 1993)

Likewise, in *People v. Washington, supra.* at 192, 630 N.Y.S.2d 693, 694 (1995) the court drew a very clear distinction between material in the possession of law enforcement agencies and material in the possession of those other than law enforcement agencies:

> In each of the aforementioned cases, it was clear that the People's *Rosario* obligation included the material which was not produced because it was in the actual possession of a law enforcement agency. Where the material sought is in the possession of a person or agency other than a law enforcement agency, the test of the People's obligation to produce is whether the items sought are in the "control"

> of the People (*see, People v. Flynn*, 79 N.Y.2d 879, 882, 581 N.Y.S.2d 160, 589 N.E.2d 383 [material in possession of Department of Motor Vehicles, a State administrative agency, were not in control of prosecutor]; *People v. Tissois*, 72 N.Y.2d 75, 78, 531 N.Y.S.2d 228, 526 N.E.2d 1086 [statements of victims of sexual abuse made to a social worker were not in control of the prosecutor]; [a personal account of a sexual attack written by the victim, a free-lance writer, was not *Rosario* material which was in the control of the prosecutor]; *see also, People v. Fishman*, 72 N.Y.2d 884, 532 N.Y.S.2d 739, 528 N.E.2d 1212 [untranscribed plea minutes were not *Rosario* material which the People were required to produce]).

In light thereof, unlike the matter *sub judice*, the court therein found "that the duties of OCME [Office of the Chief Medical Examiner] are, by law, independent of and not subject to the control of the office of the prosecutor, and that OCME is not a law enforcement agency." *People v. Washington, id.* at 192, 630 N.Y.S.2d 693, 695 (1995)

The People herein cannot deny, and do not even suggest, that the New York State Police are not a law enforcement agency. While they do argue that the State Police are not part of this prosecution, since the State Police routinely test simulator solution statewide, the People acknowledge that the simulator solution in question "was used ... to verify the functioning of the breath testing instrument" (*Witherell Affirmation* 10/9/15, ¶ 3) used on this Defendant's breath tests and that the 0.10% Simulator Solution Record, which contains the conclusions reached following the testing of the simulator solution used herein, is a necessary foundational predicate to the admission of this Defendant's breath test results at the time of trial. There is no question, the People's protestations to the contrary notwithstanding, that the testing of simulator solution done by the New York State Police, and the results of such testing, are intended for use in possible future criminal prosecutions and are an integral part of the People's prosecution of this defendant. Why else would the People and the State Police turn over the conclusions of that testing, in the form of the 0.10% Simulator Solution Record?

In numerous situations, as it does here, the People's discovery obligation includes the "'constructive' possession of information known to government officials who 'engaged in a joint cooperative investigation' of the defendant's case (citations omitted)." *People v. Garrett*, 23 N.Y.3d 878, 887, 994 N.Y.S.2d 22, 30 (2014) As that court specifically noted, "when police and other government agents ... provide information with the goal of prosecuting a defendant, they act as 'an arm of the prosecution,' and the knowledge they gather may reasonably be imputed to the prosecutor ...." *See also*: *People v. Grant*, 16 Misc.3d 1117, 847 N.Y.S.2d 898 (Co. Ct. Essex Co. 2007) [People ordered to produce all evidence, notes, logs and other documents in possession of New York State Police for forensic examination, analysis and/or testing, pursuant to CPL § 240.20(1)(c)]; *People v. Wright*, 86 N.Y.2d 591, 635 N.Y.S.2d 136 (1995) [exculpatory information in possession of police and not the prosecution is to be disclosed to the defendant]; *People v. DaGata, supra*. [FBI notes relating to DNA testing to be turned over to defense counsel pursuant to CPL § 240.20]; *People v. Jackson*, 154 Misc.2d 718, 593 N.Y.S.2d 410 (Sup. Ct. Kings Co. 1992) ["all government investigatory agencies are arms of the Prosecutor. Therefore, one arm of the prosecution team is in possession of and responsible for all other functioning parts of the team"]; *People v. Robinson*, 53 A.D.3d 63, 860 N.Y.S.2d 159 (2nd Dept. 2008) *lv. den.* 11 N.Y.3d 857, 872 N.Y.S.2d 80 (2008) [specifically noting that New York State Police "records indicating that a machine was not operating properly are discoverable, as are the State Police rules and regulations, the operational checklist, and calibration records"]

CPL § 240.20(1)(c) provides, in pertinent part, that upon demand the People are to disclose "Any written report or document, or portion thereof, concerning a ... scientific test or experiment, relating to the criminal action or proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity, ..." CPL § 240.20(1)(k) similarly mandates the disclosure of any "written report or document, or portion thereof,

concerning a ... scientific test or experiment, including the most recent record of inspection, or calibration or repair of machines or instruments utilized to perform such scientific tests or experiments ...." There can be no denying that the testing of the simulator solution used in this defendant's case was performed by a public servant engaged in law enforcement activity.

"[S]ection 240.20 is generally construed as a mandatory directive, compelling the People to provide the items when sought by the defendant (Preiser, Practice Commentaries, McKinney's Cons. Laws of NY, Book 11A, CPL § 240.20, at 221)." *People v. DaGata, supra*, at 44, 629 N.Y.S.2d 186, 189 (1995) That section "provides that defendants receive the information whether or not exculpatory in nature." *People v. DaGata, id.* at 45, 629 N.Y.S.2d 186, 189 (1995)

Just as in *DaGata, id.* at 44, 629 N.Y.S.2d 186, 189 (1995), given "[t]he highly technical nature of this evidence, perhaps open to interpretation given the rapid pace of advances in the development of this field [it] should be subject to the evaluation and strategy of defendant's counsel and experts." The Defendant should be free to challenge "(1) the State Police's methodology in general, (2) the type of [simulator solution] testing used, (3) storage methods or (4) whether other tests or analyses could have resulted in a more proficient reading of the materials analyzed." *DaGata, id.* at 45, 629 N.Y.S.2d 186, 189 (1995) The Defendant should not be hindered in their discovery and trial preparation by the recalcitrance of the People and their partner in crime fighting, the New York State Police; nor is the Defendant simply to be expected to take the word of the New York State Police as to the sufficiency, or the best use to be made of, the testing of the simulator solution. It has long been recognized "that the best judge of the value of evidence to a defendant's case is 'the single-minded devotion of counsel for the accused (*People v. Baghai-Kermani*, 84 N.Y.2d 525, 531, 620 N.Y.S.2d 313, 644 N.E.2d 1004; *People v. Flores*, 84 N.Y.2d 184, 187, 615 N.Y.S.2d 662, 639 N.E.2d 19; *People v. Banch*, 80 N.Y.2d 610, 615, 593 N.Y.S.2d

491, 608 N.E.2d 1069; *People v. Young*, 79 N.Y.2d 365, 371, 582 N.Y.S.2d 977, 591 N.E.2d 1163)." *People v. DaGata*, 86 N.Y.2d 40, 45, 629 N.Y.S.2d 186, 189 (1995)

"In fashioning an 'appropriate' response to the prosecution's wrongful failure to [disclose] evidence (see CPL 240.70, subd. 1), the degree of prosecutorial fault surely may be considered, but the overriding concern must be to eliminate any prejudice to the defendant while protecting the interests of society. ... Although the choice of 'appropriate' action is committed to the sound discretion of the trial court, as a general matter the drastic remedy of dismissal should not be invoked where less severe measures can rectify the harm done by the loss of evidence." *People v. Kelly*, 62 N.Y.2d 516, 521-522, 478 N.Y.S.2d 834, 836-837 (1984) So too, "[p]reclusion of evidence is a severe sanction, not to be employed unless any potential prejudice arising from the failure to disclose cannot be cured by a lesser sanction." *People v. Jenkins*, 98 N.Y.2d 280, 284, 746 N.Y.S.2d 651, 654 (2002)

In fashioning an appropriate remedy herein, the court needs to consider the significance of the documents the People have failed to disclose. In a prosecution for a violation of VTL § 1192(2) proof of the results of the Defendant's breathalyzer test is essential.

> As a foundational requirement for the admission of breathalyzer test results in a prosecution under Vehicle and Traffic Law § 1192, the People must introduce evidence from which the trier of fact could reasonably conclude, *inter alia*, that the testing device was in proper working order at the time the test was administered to the defendant (*People v. Todd*, 38 N.Y.2d 755, 381 N.Y.S.2d 50, 343 N.E.2d 767) and that the chemicals used in conducting the test were of the proper kind and mixed in the proper proportions (*People v. Donaldson*, 36 A.D.2d 37, 319 N.Y.S.2d 172; *People v. Meikrantz*, 77 Misc.2d 892, 351 N.Y.S.2d 549).

People v. Freeland, 68 N.Y.2d 699, 700, 506 N.Y.S.2d 306, 307 (1986); *See also*: *People v. Alvarez*, 70 N.Y.2d 375, 521 N.Y.S.2d 375 (1987)

The People typically attempt to meet the second prong of this foundational requirement, and this case is no different, by offering into evidence the conclusory statements of

Carrie A. Kirkton. Supervisor of Forensic Services, Breath Analysis Technical Supervisor for the New York State Police, contained in the 0.10% Simulator Solution Record, wherein Ms. Kirkton states:

> I, Carrie A. Kirkton, tested simulator simulator solution lot number 14180 by headspace gas chromatography and have determined that it contains the appropriate concentration of ethyl alcohol. This solution is hereby approved for use.
>
> When this simulator solution is used with a properly operating breath testing instrument, it will provide a value of 0.10% within acceptable limits.

This document is admissible at the time of trial, without Ms. Kirkton's appearance, as a non-testimonial business record pursuant to *People v. Pealer*, 20 N.Y.3d 447, 962 N.Y.S.2d 592 (2013). Upon a proper foundation being laid pursuant to CPLR § (a) and (c), this document will be admissible whether or not the People turned over the actual paperwork completed at the time the simulator solution was tested. The admission of Ms. Kirkton's conclusions, however, are not dispositive of the issue, but go to the "primary objective, which is to provide the factfinder a basis to determine whether the particular instrument used produced reliable results in a specific instance." *People v. Bosic*, 15 N.Y.3d 494, 499, 912 N.Y.S.2d 556, 559 (2010) Ultimately, it is for the factfinder to decide if they accept these conclusions.

The admission of Ms. Kirkton's statement notwithstanding, "nothing prevents an accused from seeking to introduce relevant evidence that may affect other foundational issues or the weight that should be given to results generated by a particular device, as defendant [is] attempt[ing] [to do in this case.]" *People v. Bosic*, *supra*, at 501, 912 N.Y.S.2d 556, 560 (2010) The People's failure to disclose the paperwork actually completed when the simulator solution was tested, as opposed to Ms. Kirkton's conclusions, certainly makes the Defendant's job unnecessarily

more difficult. The Defendant has been deprived the opportunity to have his own expert review these documents and challenge the methodology used and/or the results achieved.

In attempting to alleviate the prejudice to the Defendant, while protecting the interests of society, the court finds that both interests will be served by placing these foundational issues before the fact finder, as anticipated by the Court of Appeals, *See*: *People v. Freeland, supra.* and *People v. Bosic, supra.*, while placing the Defendant in a position to challenge the testing of the simulator solution and, by extension, the breath test results.

Accordingly, that branch of the Defendant's motion seeking an order imposing sanctions for the People's failure to comply with this court's order of July 28, 2015 is granted; and, it is hereby

ORDERED, that at the time of trial the Defendant shall be entitled to discuss with the fact finder the existence of, and the People's failure to provided, documents relating to the testing of simulator solution lot number 14180 by the New York State Police and shall be entitled to cross-examine witnesses regarding same. Additionally, the court shall give the jury a missing documents or adverse inference charge regarding these documents.

This constitutes the decision and order of this court.

Dated: Hempstead, New York
November 23, 2015

ANDREW M. ENGEL
J.D.C.