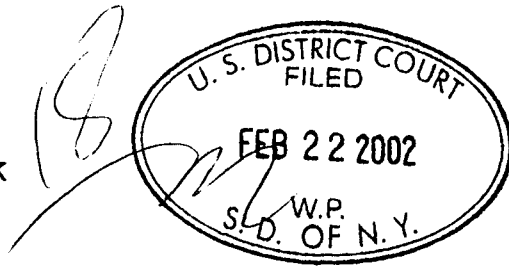




PN-NY-002-012

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



NICOLE SARNICOLA,

PLAINTIFF

vs

THE CITY OF NEW YORK, etc.,
et al.,

DEFENDANTS

01 Civ 6078 (CM) (MDF)
PLAINTIFF'S CONSOLIDATED
LOCAL RULE 56.1 STATEMENT IN
SUPPORT OF HER CROSS MOTION
MOTION FOR SUMMARY JUDGMENT/
COUNTER RULE 56.1 STATEMENT
RELATIVE TO THE DEFENDANTS'
RULE 56.1 STATEMENT

Now comes the Plaintiff, by and through her counsel, and hereby and herein offer the following Rule 56.1 Statement in support of her Cross Motion for Summary Judgment and as a Counter Rule 56.1 Statement relative to the Defendants' Rule 56.1 Statement.

I. THE PLAINTIFF'S STATEMENT OF RELEVANT UNCONTESTED MATERIAL FACTS

A. SERGEANT THOMAS MCGURN'S ROLE IN THE ARREST, SEARCH, DETENTION, AND RELEASE OF THE PLAINTIFF

[1] Defendant Sergeant Thomas McGurn directed that the Plaintiff be stopped, questioned, arrested [taken into custody], subjected to an intrusive body search, interrogated, detained and, eventually, released. See: McGurn deposition testimony at pages 10-11; 27; 29; 34; 56-57; 69; 87-88.

[2] Sergeant McGurn was the command officer of the field operation that resulted in the arrest of the Plaintiff (Rowan deposition testimony at page 13).

B. THE INFORMATION KNOWN TO SERGEANT MCGURN
WHEN HE DIRECTED THE PLAINTIFF'S ARREST

The only relevant material facts are those which Sergeant McGurn knew when he directed the Plaintiff's arrest (McGurn deposition testimony at page 47). At the time that Sergeant McGurn directed the arrest of the Plaintiff on April 26, 2001, he possessed the following relevant uncontradicted material facts [information]:

[1a] Gabriel [REDACTED] was an individual who had been under surveillance by the Westchester County Police including himself (McGurn deposition testimony at page 9);

[2a] in the two weeks prior to April 26, 2001, [REDACTED] had been observed engaging in ecstasy drug transactions with a Westchester County undercover police officer (McGurn deposition testimony at pages 9-10, 15, 39, 41-43);

[3a] As a consequence of the pre-April 26, 2001 surveillance of [REDACTED] McGurn believed that [REDACTED] had a male ecstasy supplier (McGurn deposition testimony at page 23); he did not believe that the supplier was a woman (McGurn deposition testimony at page 104);

[4a] in a pre-April 26, 2001 drug transaction, [REDACTED] was observed in the company of a white male at a time proximate to an undercover drug transaction although the white male was not physically present during the pre-April 26, 2001 drug transaction between [REDACTED] and the undercover (McGurn deposition testimony at pages 21-23);

[5a] on the late afternoon of April 26, 2001 [REDACTED] drove his vehicle [a Toyota] into a parking lot behind the CVS on South Broadway in Tarrytown New York to engage in a pre-arranged drug transaction (Rowan 4/26/01 field report);

[6a] he was alone in his vehicle (Rowan 4/26/01 field report);

[7a] a second vehicle [a Durango], in which three individuals [a female and two males] were situated, had been reported to be following the [REDACTED] vehicle (Rowan 4/26/01 field report);

[8a] the second vehicle, which was driven by the female, parked proximate to the [REDACTED] vehicle (Rowan 4/26/01 field report);

[9a] [REDACTED] exited his vehicle and the three individuals exited their vehicle (Rowan 4/26/01 field report);

[10a] Detective George Rowan, who was conducting a surveillance in the parking lot behind the CVS Pharmacy observed such at or about 5:40 (see: Rowan 4/26/01 field report);

[11a] Rowan documents in his report that "when all the subject [sic] were out of their respective cars, the three...males gave each other five and conversed momentarily (Rowan 4/26/01 field report);

[12a] the individuals left the parking lot at approximately the same time (Rowan 4/26/01 field report);

[13a] Rowan documents in his report: "All the subjects walked toward North Broadway...The female subject and the male subject, wearing the black jacket and the black pants, walked south on North Broadway. The other two subjects turned the corner and appeared to walk north on North Broadway." (Rowan 4/26/01 field report);

[14a] within minutes after leaving the lot, [REDACTED] returned to the parking lot in a vehicle being driven by Kelly (Rowan 4/26/01 field report);

[15a] [REDACTED] engaged in a drug transaction with Kelly by exchanging a large quantity of ecstasy tablets, then in the trunk of [REDACTED] vehicle and retrieved by him from his trunk, for a significant sum of money provided to him by the undercover Kelly in Kelly's vehicle (Kelly and Rowan 4/26/01 field reports);

[16a] Sergeant McGurn went up to Kelly's vehicle where [REDACTED] had just been taken from the vehicle and placed under arrest by Rowan pursuant to a pre-ordained signal from Kelly that the transaction had taken place (Rowan and McGurn 4/26/01 field reports; Kelly deposition testimony at pages 14-15; McGurn deposition testimony at page 89; Rowan deposition testimony at pages 33-35, 39-43);

[17a] Kelly documents in his 4/26/01 field report that, after giving the signal and as soon as [REDACTED] was placed under arrest by members of the Westchester County Police Department, he [Kelly] "...immediately returned to [his] vehicle, recovered the twenty two thousand dollars in U.S. currency that Gabe had dropped on the front passenger seat and secured

it in my left front pants pocket." (Kelly 4/26/01 field report; Kelly deposition testimony at pages 30-35);

[18a] Rowan documents in his report that Sergeant McGurn "immediately directed [Rowan] to give out the descriptions of the other three." (Rowan 4/26/01 field report);

[19a] Sergeant McGurn documents in his report that, after providing him his rights, McGurn: asked [REDACTED] if he wanted to cooperate; [REDACTED] indicated yes; Sergeant McGurn asked [REDACTED] who gave him the five thousand pills of ecstasy and [REDACTED] responded "Mike"; Sergeant McGurn asked [REDACTED] whether "Mike" came up in the silver Durango and [REDACTED] responded yes; [REDACTED] indicated that "Mike" had followed his vehicle from Brooklyn because "Mike" wanted his money for the five thousand pills (McGurn 4/26/01 field report);

[20a] the foregoing exchange between [REDACTED] and Sergeant McGurn was memorialized by Sergeant McGurn on April 26, 2001 in his field report (McGurn 4/26/01 field report);

[21a] Sergeant McGurn does not document in his report any other exchange between him and [REDACTED] and any other information conveyed to McGurn at that time before/at or about the time of issuing the order that the female and two other males be arrested (McGurn 4/26/01 field report);

[22a] Sergeant McGurn does not document in his 4/26/01 report or any other report any information provided to him by Kelly and/or any other individual about having seen the female, [REDACTED] and another male do a "walk by surveillance" of Kelly's vehicle at or about the time that [REDACTED] entered the vehicle on Broadway or any other point in time and Kelly does not document conveying such information to McGurn in his report and, furthermore, states in his deposition testimony that he and McGurn did not have any exchange at the time and location of the [REDACTED] arrest (Kelly and McGurn 4/26/01 field reports; Kelly deposition testimony at pages 34-36);

[23a] McGurn did not ask [REDACTED] about what, if any, knowledge he had about the involvement of any other person in the Durango vehicle in the drug enterprise and [REDACTED] did not implicate anyone other than "Mike" in the drug transaction (McGurn deposition testimony at pages 31-33);

[24a] Kelly testified that, if [REDACTED] exonerated the Plaintiff and Rossi and if all the information available with respect to Sarnicola was her presence in the vehicle and proximity to Tricardo and [REDACTED] there would be no probable cause for the arrest of the Plaintiff (Kelly deposition testimony at pages 85-86);

[25a] according to McGurn he directed the arrest of the Plaintiff and Frank Rossi simply because "...as far as I was concerned, they are all part of the deal. They all came up in the car. They are all part of the sale at that time...and I direct everybody to find them." (McGurn deposition testimony at page 34);

[26a] according to McGurn he would have directed the arrest of the Plaintiff even without the information he claims to have received from Kelly regarding the alleged "walk by surveillance" of the Kelly vehicle by the Plaintiff and Rossi (McGurn deposition testimony at pages 103-104);

[27a] Kelly documented in his 4/26/01 contemporaneous field report: "At approximately 1735 hours, I parked my undercover vehicle... in front of Pay Half Store...on Broadway in the Village of Tarrytown. At approximately 1740 hours, a subject known to me as "Gabe" arrived driving a green 4 door Toyota Camry...Gabe traveled north on Broadway and west into the CVS parking lot...I immediately used my department cell phone to call Gabe...I told Gabe where I was and he said he would meet me in five (5) minutes. At approximately 1754 hours, I received a page from Gabe and at the same time he entered my vehicle on the front passenger side." (Kelly 4/26/01 field report);

[28a] Kelly does not memorialize in his report that he observed a female and a male walk by his car with [REDACTED] and look into his car when [REDACTED] got into his car or that he communicated such information to anyone and McGurn does not document in his report that he was informed of such information by Kelly (Kelly and McGurn field 4/26/01 field reports); and Kelly further does not testify that he had such a communication exchange with McGurn at the time and place of the [REDACTED] arrest [or otherwise] (Kelly deposition testimony 34-36);

[29a] McGurn believes that the information about an alleged "walk by surveillance" of a vehicle by people associated with a drug buy is of consequence and should be recorded (McGurn testimony at page 102-103);

[30a] Kelly deems any alleged walk by surveillance of his vehicle as part of drug transaction to be significant but nonetheless he did not record such as part of his contemporaneously executed 4/26/01 field report even though he would have recorded such if, in the course of the walk by surveillance, the individuals had stood outside of his vehicle (Kelly deposition testimony at pages 71-77);

[31a] McGurn does not document in his 4/26/01 report any exchange with [REDACTED] prior to McGurn directing that the

three individuals be arrested or at any time, in which [REDACTED] describes the substance of any exchange between him and Tricardo on the cell telephone when they were traveling, in separate vehicles, to Tarrytown (McGurn 4/26/01 field report);

[32a] McGurn does not document in his report any communication which he had with [REDACTED] prior to McGurn directing the arrest of the three other individuals or at any time, in which [REDACTED] describes any discussions he had with any of the three individuals, individually and/or collectively, in the parking lot once everyone had exited their vehicles;

[33a] Sergeant McGurn had never previously heard or been made aware of involvement by any female in the drug enterprise and had never heard the Plaintiff's name and had never observed or been made aware of any female being involved with [REDACTED] in the drug enterprise (see: McGurn deposition testimony at pages 15, 104);

[34a] Sergeant McGurn was a veteran drug offense law enforcement officer whose experience came into play, in an unquantifiable degree, in the field operation and the arrest of the Plaintiff (McGurn Affidavit; McGurn deposition testimony at pages 104-105);

[35a] with the foregoing information and within a couple of minutes of the arrest of [REDACTED] Michael Tricardo was arrested on North Broadway, just north of the CVS (Rowan 4/26/01 field report);

[36a] at approximately 6:00 the Plaintiff and Michael Rossi were arrested on North Broadway, just north of Main Street, in front of a store located at 41 North Broadway in front of Novellos (Rowan 4/26/01 field report);

[37a] Detective Rowan documents in his report that he "positively identified those subjects as the subjects that I observed exit the Dodge Durango." (Rowan 4/26/01 field report; Rowan deposition testimony at pages 54-60);

[38a] Kelly does not document in his report that he made any identifications of any of the individuals arrested on North Broadway (Kelly 4/26/01 field report);

[39a] at the time of her arrest, the Plaintiff was not given any statement of her "Miranda rights". She was given her "Miranda rights" prior to her being strip searched; and, then, when she memorialized her statement in writing, she signed her "Miranda rights" form although she was not verbally advised of the rights, again, when she was subjected to interrogation and prior to her signing her statement (Sarnicola Affidavit);

[40a] the protocol is for a "felony arrestee" to be given "Miranda rights" at the time of arrest (Pierro deposition testimony at pages 40-41).

[41a] at the time of her arrest, the Plaintiff was not subjected to a pat down search or any other kind of frisk or search before being placed in a vehicle for transport to a police facility and she did not receive any kind of search frisk procedure before being subjected to the strip search procedure (Sarnicola Affidavit);

[42a] pursuant to Westchester County Department of Public Safety General Order 41.01, Prisoner Transport; searching/handcuffing, Issue Date 01/01/92, Effective Date 06/05/92, "...the person taken into custody shall be frisked immediately after apprehension and handcuffed";

[43a] pursuant to Westchester County Department of Public Safety Order 25.01, Constitutional Guidelines, Issue Date 01/01/92, Effective Date 11/28/97, "during stop and frisk situations where there is insufficient probable cause to effect an arrest...questioning must be limited to ascertaining subject's identity and reason for being in the area. If...probable cause for arrest exists, appropriate constitutional warnings must be given prior to any further questioning."

[44a] if McGurn had not given the direction to arrest the Plaintiff, Kelly would have done so in any event "to question them [Plaintiff, Rossi, and Tricardo] to see what was going on." (Kelly deposition testimony at pages 57-58)

[45a] Kelly assumed that McGurn had directed the Plaintiff's arrest but he did not hear any direction by McGurn to arrest her/them (Kelly deposition testimony at pages 56-57);

[46a] Kelly assumed that McGurn wanted the Plaintiff arrested because "this is how we conduct this type of investigation." (Kelly deposition testimony at page 57).

[47a] according to Kelly it was his understanding that simply because the Plaintiff was with Tricardo in the vehicle that had followed the [REDACTED] vehicle such was sufficient probable cause for her arrest (Kelly deposition testimony at page 78);

[48a] according to Kelly, the arrest of the Plaintiff and Rossi would have occurred in this type of situation "...to see what their degree of facilitation of this crime was, and at a later point if it's determined that they did not take part in this or they did --that then we would let them go, but

we definitely bring them in to question them. We don't know on the scene if the pills could have belonged to Nicole or Frank, so they would have been arrested, too, and brought back to headquarters to see what their degree of involvement was in the situation." (Kelly deposition testimony at page 79).

[49a] otherwise put, "...the totality of all circumstances that occurred, Detective Rowan watched these people get out of the vehicle, greet [REDACTED] so yes, given these circumstances, all three people if able to be apprehended would be arrested, brought back to headquarters, and questioned to see--and to--so we can determine what their involvement in this action was." (Kelly deposition testimony at page 80).

[50a] in substance, McGurn, as well, deemed the fact that Sarnicola and Rossi were in the vehicle to be "all part of the deal"--"all part of the sale" and deemed such sufficient to arrest them (McGurn deposition testimony at pages 34-36);

[51a] Beckley, who conducted the strip search of the Plaintiff, was informed and understood that the Plaintiff had been arrested because "she was with them." (Beckley deposition testimony at page 24-26).

[52a] Pierro, who interrogated Sarnicola at the police facility, indicated that, prior to his commencement of the interrogation, he had been informed that Sarnicola was arrested "because she was in a group of people involved in the bust operation and they were all brought to headquarters" where it was his "assignment...to discuss with her the level of involvement with these people." (Pierro deposition testimony at page 13).

[53a] it was only after Sarnicola was informed by the police while she was in custody that Tricardo was involved in a drug transaction, that she became aware of what Tricardo had done and was doing. She had no knowledge whatsoever of such; and, when informed, Sarnicola was shocked; figuratively speaking, her "...face hit the floor". (Sarnicola Affidavit).

[54a] on the way to Brooklyn, Sarnicola and Rossi were permitted to drink beer in the police vehicle although Pierro denies that either he or Antonecchi drank beer even though Sarnicola alleges such and Rossi testified that Pierro and Antonecchi did drink beer (Pierro deposition testimony at pages 60-64; Rossi deposition testimony at pages 39-42 and 53-54; Plaintiff's Complaint).

C. THE BASIS FOR SERGEANT MCGURN'S DIRECTIVE
TO SUBJECT THE PLAINTIFF TO A STRIP SEARCH

At the time that Sergeant Thomas McGurn directed the strip search of the Plaintiff the following relevant material facts are uncontradicted:

[1b] McGurn directed that the Plaintiff be subjected to a strip search pursuant to and under the authority of the policy of the County of Westchester encompassed in Westchester County Department of Public Safety General Order, Section 42.05, encaptioned "Cavity Searches of Prisoners", Issued Date 01/0/92/Effective Date 01/01/92 (McGurn deposition testimony at pages 57, 65-67);

[2b] McGurn had no independent basis to believe that the Plaintiff was concealing contraband and/or a weapon (McGurn deposition testimony at pages 58-68);

[3b] McGurn understood the County policy to allow him to subject any individual, who was arrested for any drug offense, to a strip search without any other independent factor[s] related to either the individual or circumstances of the alleged crime (McGurn deposition testimony at page 66 "...anything dealing with drugs, anything--");

[4b] Westchester County Department of Public Safety General Order 42.05 which allows for a strip search on "reasonable suspicion" [less than probable cause] in conjunction with other factors related to the circumstances of the arrested individual and/or the circumstances of the arrest;

[5b] the Plaintiff was subjected to the strip search during which process Ms. Sarnicola periodically cried (Beckley deposition testimony at pages 15-18);

[6b] the procedures required to be followed, where as here a strip search was undertaken, were not followed: the policy requires that two officers of the same sex be present and during the search in this case only one, Officer Beckley, was present (Sarnicola deposition testimony at pages 61-62); and the policy requires that every strip search must be documented in a written report and no written report was made as part of the arrest reports (see Westchester County Department of public Safety General Order 42.05 (Beckley deposition testimony at page 39);

[7b] Sarnicola was not subjected to any kind of frisk, pat, or other search prior to being subjected to the strip search (Sarnicola Affidavit);

[8b] Beckley conducted the strip search pursuant to a supervisor's direction (Beckley deposition testimony at page 23);

[9b] pursuant to the strip search procedure, Beckley went into a cell and directed the Plaintiff to remove her clothing items, one by way, including her skirt, her shirt, her underwear and bra, and to turn around and bend over; and the Plaintiff complied (Beckley deposition testimony at pages 16-19);

[10b] No contraband was found on Sarnicola (Beckley deposition testimony at page 19).

D. THE PLAINTIFF'S DETENTION AND EVENTUAL RELEASE

The following are uncontested material facts related to the Plaintiff's excessive detention claim:

[1c] Pursuant to Sergeant McGurn's directive the Plaintiff was arrested at or about 6:00 P.M. (Rowan 4/26/01 field report);

[2c] she was transported to the Westchester County Department of Public Safety Facility [after initially being transported for a very brief period to the Village of Tarrytown Police Department] (Sarnicola 50[h] hearing testimony at pages 36-40; Sarnicola deposition testimony at pages 49, 52);

[3c] the Plaintiff was not fingerprinted or photographed or booked when she was brought to the Westchester County Police Department facility (McGurn deposition testimony at page 106) although the Plaintiff was eventually photographed (Sarnicola 50[h] hearing testimony at page 39); and she was never charged with any crime or otherwise booked (see Sarnicola arrest report);

[4c] she was subjected to the strip search (Sarnicola 50[h] hearing testimony at pages 42-44; Sarnicola deposition testimony at pages 59-64; Beckley deposition testimony at pages 16-19);

[5c] then, she was interrogated, at the outset of which she was informed "...sweetheart, we want to let you go" (Sarnicola deposition testimony at pages 69, 74), and which at the conclusion of the interrogation resulted in her memorializing a statement commencing at or about 8:20 P.M. and concluding at or about 8:45 P.M. (Sarnicola 4/26/01 statement; Sarnicola 50[h] hearing testimony at pages 44-47; Sarnicola deposition testimony at pages 64-71; Pierro deposition testimony at page 44);

[6c] the Plaintiff was, then, informed that she would be able to leave "soon" (Sarnicola 50[h] hearing testimony at pages 47-52; Sarnicola deposition testimony at pages 77-78);

[7c] if the Plaintiff had been informed that she could leave at the time that she completed her interrogation and wrote out her statement at or about 8:45 P.M., she would have left in a "heart beat". She would have endeavored to locate a train and take a train back to the City; she actually inquired, right after she finished writing out her statement whether there was a bus or train that she could get to return to the City and it was at that time that she was told that she would be able to leave "soon" (Sarnicola Affidavit);

[8c] periodically the Plaintiff asked when she could leave and was continuously informed "soon" (Sarnicola deposition testimony at pages 77-78);

[9c] that based on the "soon" pronouncements, the Plaintiff did not believe that she was free to leave (Sarnicola Affidavit);

[10c] Sarnicola believes that it was unreasonable not to tell her that she could not leave when she first asked and then periodically asked thereafter and when she was informed "soon"; and she further believes that it was unreasonable not to let her leave once she completed her statement at or about 8:45 P.M. (Sarnicola Affidavit);

[11c] Frank Rossi completed his interrogation and statement at or about 10:45 P.M. [Rossi 4/26/01 statement]; Rossi was, thereafter, detained for approximately one half hour or thereabouts before he and the Plaintiff were informed that they could go home (Rossi deposition testimony at pages 33-35);

[12c] it was not until about 11:30 P.M. when Sarnicola was informed that she could leave (Sarnicola Affidavit);

[13c] Sarnicola was taken to the front desk and Frank Rossi was already there and the Plaintiff waited another twenty minutes to forty five minutes before she and Frank Rossi actually left the facility with the officers (Sarnicola 50[h] hearing testimony at pages 48-49,51);

[14c] thereafter, the Plaintiff and Rossi were informed that they could get a ride back to Brooklyn since Officer Pierro and others were going to Brooklyn to do some business in connection with the arrest and detention of Mr. Tricardo (Rossi deposition testimony at pages 35-37; Sarnicola 50[h] hearing testimony at page 51; McGurn deposition testimony at pages 69-70, 73-74 where he concedes that it was two hours

after Ms. Sarnicola completed her statement before he indicated she could leave);

[14c] McGurn indicated that Ms. Sarnicola was not released when she completed her statement because the investigation was on-going (McGurn deposition testimony at page 70);

[15c] it was between twenty minutes and 45 minutes before Rossi and Sarnicola left the Department facility once she and Rossi were brought to the desk on the first floor at or about 11:30 or thereabouts (Sarnicola 50 [h] hearing testimony at page 51);

[16c] the Plaintiff thought it was unreasonable for the police to hold her once she had given a statement and was not informed that she could leave but that she would be able to leave "soon" (Sarnicola Affidavit; Sarnicola deposition testimony at pages 72-76).

II. THE CONTESTED FACTS

Based on the Defendants' submissions, it is important that the Court be clear as to what facts the Plaintiff contends are in dispute.

A. THE ALLEGED "HUDDLE"

The Defendants contend that, when Sarnicola, Tricardo and Rossi, and [REDACTED] exited their respective vehicles, they came together, in a huddle type of configuration, spoke and "high fived" each other (McGurn deposition testimony at pages 24-25 ["...she was standing right in the middle of the huddle. They were four people all facing each other to the center."]); McGurn deposition testimony at page 96).

The Plaintiff categorically denies such. See: Sarnicola 50[h] hearing testimony at pages 27-30; Sarnicola deposition testimony at pages 33-40; Sarnicola Affidavit; Rossi deposition testimony at pages 20-24. Sergeant McGurn's report, memorialized on 4/26/01 does not document such (McGurn 4/26/01 field report); and Detective Rowan, whose observations were the primary observations of what took place in the CVS parking lot, does not document the same. His report states: "When all of the subject [sic] were out of their respective cars, the

three (3) males gave each other five and conversed momentarily." (Rowan 4/26/01 field report).

Both the Plaintiff and Mr. Rossi deny that any "high fives" were given. Sarnicola and Rossi testify that there were momentary remarks in which Sarnicola indicated that she was going to the bathroom and asked Frank Rossi if he wanted to go with her (Sarnicola deposition testimony at pages 34-38; Sarnicola 50[h] hearing testimony at pages 28-30; Rossi deposition testimony at pages 18-23). Although Tricardo and ██████ left the parking lot, they did not do so, together, with the Plaintiff and with Mr. Rossi even if they may have been exiting at or about the same time as the Plaintiff and Rossi were leaving the parking lot. Ms. Sarnicola and Mr. Rossi believed that ██████ and Tricardo were behind them and that, when they [Plaintiff and Rossi] turned on Broadway after leaving the parking lot, they believed ██████ and Tricardo to still be somewhere in the parking lot (Sarnicola and Rossi testimonies, supra; Sarnicola Affidavit).

B. THE ALLEGED "WALK BY SURVEILLANCE"

Defendant McGurn has asserted that, prior to the point in time when he directed the arrest of the Plaintiff, he [McGurn] was aware/had been informed by Detective Kelly that the Plaintiff, Mr. Rossi and ██████ walked toward the location where he [Kelly] was parked and that, as they passed, Rossi and the Plaintiff looked into his vehicle and continued on while ██████ got into Kelly's vehicle (McGurn deposition testimony at pages 26, 100-101).

The Plaintiff contests that Kelly observed such and that he communicated such and the Plaintiff contests that McGurn knew such. As it turned out, when the Plaintiff and Mr. Rossi exited the CVS parking lot got to the street and exited the parking lot, they turned right which is south on North Broadway (Sarnicola deposition testimony at pages 35-36, 40; Sarnicola 50[h] hearing testimony at page 30; Rossi deposition testimony at page 23). Such is corroborated in the report written by Detective Rowan (see Rowan 4/26/01 field report). Apparently, Tricardo and ██████ exited onto South Broadway and turned north [the opposite direction, see: Rowan 4/26/01 field report] --the area in which, according to Detective Kelly, his vehicle was located (see: Kelly 4/26/01 field report and Kelly deposition testimony at pages 16-17).

Nowhere does Detective Kelly memorialize the fact of the

conduct he attributes to the Plaintiff and Rossi or of the fact of advising McGurn or anyone else of such; nor does McGurn memorialize being informed of such. All Detective Kelly writes is: "At approximately 1745 hours, I received a page from Gabe and at the same time he entered my vehicle on the front passenger side." As noted, to the extent that Detective Rowan recorded, as part of his observation, the direction in which Rossi and Sarnicola went once they reached South Broadway, such direction was the opposite direction in which [REDACTED]. The reports from Rowan and Kelly make it clear that he had no communications in this regard, or for all intent and purposes in any respect, with McGurn at the time and location of [REDACTED] arrest (Kelly and Rowan 4/26/01 field reports; Kelly deposition testimony at pages 31-36; McGurn deposition testimony at pages 101-102).

Moreover and notwithstanding that Kelly testified at his deposition that he identified Ms. Sarnicola on South Broadway when she was arrested, he does not indicate such in his report (Kelly 4/26/01 field report). On the other hand, Rowan, who had observed Ms. Sarnicola when she exited the vehicle in the parking lot and had distributed her characteristics over police communications, indicates in his report that it was he, after being called to South Broadway from the parking lot, who identified Ms. Sarnicola when she was placed under arrest, once again undercutting the credibility of the assertions of Kelly that the Plaintiff and Rossi went by his vehicle and looked into it and that he ever communicated such to anyone (Kelly and Rowan 4/26/01 field reports).

C. THE ALLEGED [REDACTED] AND MCGURN EXCHANGE

Defendant McGurn also now contends that, in addition to learning from [REDACTED] that Tricardo was his ecstasy supplier before or at or about the time that McGurn gave the directive to arrest Tricardo, Rossi and the Plaintiff, [REDACTED] also informed him at that time that "...he and Tricardo had numerous cell phone conversations during the trip from Brooklyn in which Tricardo instructed [REDACTED] about how the drug deal should take place and that it should happen quickly". See: McGurn February 1, 2002 Affidavit. McGurn now states, as well, that [REDACTED] informed him [when [REDACTED] was arrested and waived his rights and spoke to

McGurn] that "when the two cars first parked in the CVS parking lot and all parties exited their vehicles, and engaged in a brief discussion, Tricardo again dictated how the drug deal should take place and that it should be completed quickly." See: McGurn February 1, 2002 Affidavit.

In that regard, the Plaintiff and Mr. Rossi do not deny that, during the course of the trip from Brooklyn to Tarrytown, Tricardo was on the cell phone on some occasions but that, other than for asking [REDACTED] how much longer it would be before they arrived, there was little discussion of which they are aware and certainly nothing to suggest to either of them, from the portion of the conversation[s] that they were aware that was on-going, of anything about a drug transaction (Sarnicola 50[h] hearing testimony at pages 25-26; Sarnicola deposition testimony at pages 30-32; Sarnicola Affidavit; Rossi deposition testimony at page 16). Moreover, there is no evidence whatsoever that [REDACTED] at all indicated that all of the parties engaged in a discussion during which the Plaintiff became aware/was aware of the drug transaction/enterprise that was then on-going. In fact, at no time did McGurn ever testify at any point in his deposition that [REDACTED] ever informed him, at the time of his arrest and just prior to McGurn giving his directive to arrest Rossi, Tricardo and the Plaintiff, of anything but the fact that Tricardo ["Mike"] was his supplier and that Tricardo was one of the individuals in the Durango (see: McGurn 4/26/01 field report). In fact, when asked whether or not [REDACTED] indicated anything else to him other than that Tricardo was his supplier and that Tricardo was in the Durango vehicle, McGurn testified at his deposition, without any equivocation, no. See: McGurn deposition testimony at pages 32-34.

To the extent that his deposition testimony when taken as a whole can be read to indicate that he needed to review his report to determine whether there was anything further said by [REDACTED] McGurn's report makes no reference to being informed of anything else by [REDACTED] at that time [prior to the McGurn directive to arrest the Plaintiff, Tricardo, and Rossi] other than Tricardo was his supplier and that Tricardo [known as "Mike"] was in the other vehicle (McGurn 4/26/01 field report). To the extent that [REDACTED] post arrest statement makes mention of communications, etc., that statement was not taken until much latter at or about 8:00 P.M. ([REDACTED] 4/26/01 statement). Defendant McGurn has collapsed times and information to advance and to bolster, after the fact, the knowledge which he now claims to have had at the time of his direction to arrest the Plaintiff when, in

fact, he did not, at that time, have certain of the knowledge. He has, for all intent and purposes, admitted that he did not then have certain knowledge he now claims to have had through his deposition testimony and the substance of his contemporaneously recorded 4/26/01 field report neither of which make reference to the information he now claims [REDACTED] and Kelly provided him just prior to or at or about the time of the McGurn directive to arrest the Plaintiff.

What is the most significant aspect of the entire discussion with [REDACTED] is that, while [REDACTED] specifically identifies Tricardo as the supplier, thereby establishing the probable cause for the arret of Tricardo, [REDACTED] provided McGurn with no information specifically linking the Plaintiff or Mr. Rossi to the drug transaction or to having any knowledge of the drug transaction. Therefore, the information, as attributed to Kelly and to [REDACTED] [other than for the [REDACTED] identification of Tricardo as the supplier] should be discounted in making the assessment as to what McGurn knew at the time that the Plaintiff was arrested.

Ultimately, both McGurn and Kelly have testified that the contested information would not have made any difference and that, based on the mere presence of the Plaintiff in the vehicle which followed the [REDACTED] vehicle and the momentary exchange between the occupants of the vehicle when they existed their respective vehicles and the fact that Tricardo was identified by [REDACTED] as his supplier, the Plaintiff would have been arrested for the purposes of bringing her, along with Rossi, into the police facility for interrogation in order to sort it out.

Thus, from the Plaintiff's perspective, the contested information is basically irrelevant to the resolution of the claim whether the Defendant McGurn had sufficient information [when the contested information is discounted] to arrest her; and the answer, from the Plaintiff' perspective, is, categorically, no.

III. CONCLUSION

The Plaintiff, by her attorney, reserves her right to amend and supplement this document. Furthermore, the Plaintiff submits that, given the non contested relevant material facts and discounting the contested facts which, by the admission of the Defendants appear to have no bearing on their decision to arrest the Plaintiff because they would have arrested the Plaintiff in any event, this Court should deny the Defendants' Motion for Summary Judgment and grant the Plaintiff's Cross Motion. To the extent, however, that the contested facts have a bearing on how the Court should resolve the contesting Motions [arguendo], this Court should then deny the Motions on the false arrest claim although, with respect to the Plaintiff's Fourth Amendment strip search claim and/or the Plaintiff's Fourth Amendment excessive detention, the Court should enter judgment in favor of the Plaintiff.

DATED: New York, New York
February 17, 2002

Respectfully submitted,



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