People v. Beam
22 Misc.3d 306, 866 N.Y.S.2d 564
NY,2008.

22 Misc.3d 306866 N.Y.S.2d 564, 2008 WL 4756648, 2008 N.Y. Slip Op. 28428

The People of the State of New York, Plaintiff
v
Edward Beam, Defendant.
Criminal Court of the City of New York, New York County

October 30, 2008

CITE TITLE AS: People v Beam

HEADNOTES

Crimes
Reckless Endangerment
Sufficiency of Accusatory Instrument

(1) The count of an information charging defendant with reckless endangerment (Penal Law § 120.20) based upon allegations that the arresting officer observed defendant at 4:00 a.m. on a street corner in Manhattan holding "what appeared to be a marijuana cigarette" in his left hand, and that defendant, when approached by the officer, ran into traffic on a public highway "where multiple vehicles were in motion," was dismissed for facial insufficiency pursuant to CPL 100.15 (3) and 100.40 (1). In order to establish that defendant engaged in reckless endangerment, the risk created by his conduct must have been foreseeable, and the conduct must have actually created a risk of serious physical injury. The allegations herein were insufficient to find or infer that a substantial and unjustifiable risk of serious physical injury was created by defendant's hasty jaywalking.

Crimes
Obstructing Governmental Administration
Sufficiency of Accusatory Instrument

(2) The count of an information charging defendant with obstructing governmental administration in the second degree (Penal Law § 195.05) based upon allegations that the arresting officer observed defendant at 4:00 a.m. on a street corner in Manhattan holding "what appeared to be a marijuana cigarette" in his left hand, and that defendant, after running into traffic on a public highway when approached by the officer, threw away the item, thereby preventing the officer from recovering it, was dismissed for facial insufficiency pursuant to CPL 100.15 (3) and 100.40 (1). In the absence of some express and lawful order, directive or command by the officer to defendant to engage in, or refrain from, some particular action, defendant's disposal of the unidentified object, which the officer only "assumed" was contraband, did not constitute a legally sufficient basis for the charge of obstructing governmental administration. No statute or legal concept requires a citizen, by premonition or prognostication, to divine an officer's future intent to effectuate an arrest by reading the officer's mind.

Crimes
Tampering with Physical Evidence
Sufficiency of Accusatory Instrument

(3) The count of an information charging defendant with attempted tampering with physical evidence (Penal Law §§ 110.00, 215.40 [2]) based upon allegations that the arresting officer observed defendant at 4:00 a.m. on a street corner in Manhattan holding "what appeared to be a marijuana cigarette" in his left hand, and that defendant, after running into traffic on a public highway when approached by the officer, threw away the item, thereby preventing the officer from recovering it, was dismissed for facial insufficiency pursuant to CPL 100.15 (3) and 100.40 (1). The information failed to allege what, if anything, the officer was able to smell or observe that made him believe that the item discarded by defendant was marijuana. If the discarded item was not something that was illegal to possess, there would be no basis ***307** upon which to infer that defendant intended to prevent the production of the item in any prospective proceeding. Furthermore, discarding items before or while fleeing the police is not the type of conduct proscribed by the statute.

RESEARCH REFERENCES

Am Jur 2d, Assault and Battery § 21; Am Jur 2d, Indictments and Informations §§ 95, 96, 101, 126, 127, 143; Am Jur 2d, Obstructing Justice §§ 34-37, 54-56, 59, 61, 64-66, 77.

Carmody-Wait 2d, Criminal Procedure §§ 172:827, 172:837, 172:838.

LaFave, et al., Criminal Procedure (3d ed) § 19.3.

McKinney's, CPL 100.15 (3); 100.40 (1); Penal Law §§ 120.20, 195.05 (1); § 215.40 (2).

NY Jur 2d, Criminal Law: Procedure §§ 947, 955, 956; NY Jur 2d, Criminal Law: Substantive Principles and Offenses §§ 449, 452, 453, 1327, 1330, 1332, 1334, 1335, 1553-1555, 1558.

ANNOTATION REFERENCE

What constitutes obstructing or resisting officer, in absence of actual force. 66 ALR5th 397.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: information /5 facial! /2 insufficien! & suspicious /5 behavior

APPEARANCES OF COUNSEL

Legal Aid Society, New York City (*Melissa Kaplan* of counsel), for defendant. *Robert M. Morgenthau*, *District Attorney*, New York City (*David Stuart* of counsel), for plaintiff.

OPINION OF THE COURT

Marc J. Whiten, J.

In a time when individual liberty is under attack and when many in our citizenry and government seem predisposed to offer up an unidentified degree of personal freedom in exchange for the perceived premium of greater security, we must resist striking an unwise bargain in the interpretation and administration of our laws. As founding father Benjamin Franklin observed, "They that give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." In this ***308** case, the court is called upon to consider the degree to which an individual's freedom

can be constrained by police suspicion and preliminary investigation. The defendant, Edward Beam, is charged with reckless endangerment (Penal Law § 120.20), obstruction of governmental administration in the second degree (Penal Law § 195.05) and attempted tampering with physical evidence (Penal Law §§ 110.00, 215.40 [2]), and has moved to dismiss the information as facially insufficient, as well as for various other relief. For the following reasons, defendant's motion is granted and this information is dismissed.

In order to be facially sufficient, an information must substantially conform to the formal requirements of CPL 100.15. Additionally, the factual portion and any accompanying depositions must provide reasonable cause to believe the defendant committed the offense charged, as well as nonhearsay factual allegations of an evidentiary character which, if true, establish every element of the offense charged and defendant's commission thereof (CPL 100.15 [3]; 100.40 [1]; *see People v Dumas*, 68 NY2d 729 [1986];*see also People v Alejandro*, 70 NY2d 133 [1987]).

The requirement of nonhearsay allegations has been described as a "*much more***2** *demanding standard*" than a showing of reasonable cause alone (*People v Alejandro*, 70 NY2d at 139, quoting 1968 Report of Temp St Commn on Rev of Penal Law and Crim Code, Intro Comments, at xviii); however, it is nevertheless a much lower threshold than the burden of proof beyond a reasonable doubt (*People v Henderson*, 92 NY2d 677, 680 [1999];*People v Hyde*, 302 AD2d 101 [1st Dept 2003]). Thus, "[t]he law does not require that the information contain the most precise words or phrases most clearly expressing the charge, only that the crime and the factual basis therefor be sufficiently alleged" (*People v Sylla*, 7 Misc 3d 8, 10 [2d Dept 2005]). Finally, where the factual allegations contained in an information "give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 360 [2000];*see also People v Konieczny*, 2 NY3d 569 [2004];*People v Jacoby*, 304 NY 33, 38-40 [1952];*People v Knapp*, 152 Misc 368, 370 [1934],*affd*242 App Div 811 [1934];*People v Allen*, 92 NY2d 378, 385 [1998];*People v Miles*, 64 NY2d 731, 732-733 [1984];*People v Shea*, 68 Misc 2d 271, 272 [1971]; *People v Scott*, 8 Misc 3d 428 [Crim Ct, NY County 2005]).

***309** In this case, the information alleges that at four o'clock in the morning at 46th Street and 9th Avenue in New York County, a police officer observed the defendant holding "what appeared to be a marijuana cigarette" in his left hand. The information further alleges that when the officer approached the defendant, the defendant ran into traffic on a public highway "where multiple vehicles were in motion," and that the officer observed the defendant throw the item he held in his left hand, thereby preventing the officer from recovering the item.

(1) Defendant argues that all three counts in the accusatory instrument are facially insufficient. Regarding the reckless endangerment charge, defendant argues that the allegations are insufficient to establish every element of the offense, because "running into traffic" does not demonstrate a "substantial risk of serious physical injury" to another person. Penal Law § 120.20 states that a person is guilty of reckless endangerment in the second degree when he or she engages in conduct which creates a substantial risk of serious physical injury to another person. In light of the fact that "serious physical injury" is defined as that which "creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law § 10.00 [10]), the defendant's argument is persuasive. It is certainly possible, and possibly even somewhat likely, that defendant or another person might have experienced some sort of injury from an automobile accident caused by defendant's sudden and swift entry into the roadway. Nevertheless, on the facts alleged, this court can neither find nor infer that a substantial and unjustifiable risk of serious physical injury was created by defendant's hasty jaywalking. In order to establish that defendant engaged in reckless endangerment, the risk created by a defendant's conduct must be foreseeable (*see People v Reagan*, 256 AD2d 487 [2d Dept 1998]) and the conduct must actually create a risk of serious physical injury (*see Matter of Kysean D.S.*, 285 AD2d 994 [4th Dept 2001]). Accordingly, the count is dismissed.

(2) The count charging obstruction of governmental administration is likewise facially insufficient. Regarding the obstructing charge, Penal Law § 195.05 provides that
"[a] person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts***310** to prevent a public servant from performing an official function, by means of intimidation, physical force or ****3** interference, or by means of any independently unlawful act."

To be facially sufficient, the charge of obstructing governmental administration must allege an act of (1) intimidation, (2) physical force or interference, or (3) an independently unlawful act (*see* *People v Stumpp*, 129 Misc 2d 703, 704 [Suffolk Dist Ct 1985], *affd*132 Misc 2d 3 [App Term, 2d Dept 1986]). No existing statute or legal concept requires a citizen, by premonition or prognostication, to divine an officer's future intent to effectuate an arrest by reading the officer's mind. Absent some express and lawful order, directive or command by a police officer to engage in, or refrain from, some particular action, the defendant's disposal of an unidentified object-which the police only "assumed" was contraband-is not inculpatory, and certainly not a basis for a legally sufficient charge of obstructing governmental administration.

The obvious and well-settled intent of the statute is to allow police officers to go about their business without any obstacles put in their way (*see* *People v Crayton*, 55 Misc 2d 213 [1967]). Activities such as refusing to obey orders (*see* *Decker v Campus*, 981 F Supp 851 [1997]), physically resisting arrest (*see* *Matter of Shannon B.*, 70 NY2d 458 [1987]), interfering with the arrest of another (*Matter of Carlos G.*, 215 AD2d 165 [1st Dept 1995]), or assaulting a police officer (*see* *People v Joseph*, 156 Misc 2d 192 [1992]) are all typical of acts that are properly charged as obstructing governmental administration. The commonality in these offenses is an intentional insertion of one's self or one's intentions into steps taken by police officers to fulfill their duties. By comparison, in the present case, defendant was withdrawing himself and deserting the scene, apparently attempting to avoid any interaction with the officers; and in the absence of a lawful order, his departure cannot be said to be criminal. The court cannot require citizens to predict, assume or infer the directives of police authorities by surmise, thought transference or other faulty or fanciful manner.

(3) The last charge, attempted tampering with physical evidence, is also hereby dismissed. A person is guilty of tampering with physical evidence when,
"[b]elieving that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he suppresses it by ***311** any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person" (Penal Law § 215.40 [2]).

The facts alleged do not support this charge in two ways. First, defendant correctly asserts that, in the absence of any allegation concerning what, if anything, the officer was able to smell or observe that made him believe that the item was marijuana, the court cannot engage in speculation and conjecture as to the nature of the item discarded by the defendant. Thus, if the item discarded was not something which it is illegal to possess, there would be no basis upon which to infer that the defendant intended to prevent the production of the item in any prospective proceeding. Second, the act of dropping a physical object before, or while, fleeing the police does not fit within the several specifically enumerated ways that one might suppress physical evidence as proscribed by the statute. However, this court finds that discarding items before or while fleeing is not what is contemplated by the statute and declines to expand the statute's reach to that end.

In the case presently before the court, the defendant's alleged behavior may have been suspicious to the officers who observed him, warranting further investigation. However, even while viewing these allegations in the light most

favorable to the People (*see* *People v Gonzalez*, 184 Misc 2d 262 [App Term, 1st Dept 2000]), it is clear that they insufficiently plead any actual offense. Accordingly, defendant's motion to dismiss for facial insufficiency is granted.**4

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PEOPLE v BEAM

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END OF DOCUMENT

People v. Berdini
18 Misc.3d 221, 845 N.Y.S.2d 717
NY,2007.

18 Misc.3d 221845 N.Y.S.2d 717, 2007 WL 3342295, 2007 N.Y. Slip Op. 27460

The People of the State of New York, Plaintiff
v
Paolo Berdini, Defendant.
Criminal Court of the City of New York, New York County

November 1, 2007

CITE TITLE AS: People v Berdini

HEADNOTES

Crimes
Obstructing Governmental Administration
Sufficiency of Accusatory Instrument-Swallowing Object

(1) An accusatory instrument charging defendant with obstruction of governmental administration in the second degree (Penal Law § 195.05) based upon his having swallowed a small object containing a white substance upon being approached by a plainclothes police officer who identified herself after observing defendant purchase the object from an unapprehended individual was dismissed for legal insufficiency (*see* CPL 100.15 [3]; 100.40 [1]) in the absence of any allegation that the white substance was in fact contraband or that the police officer directed defendant not to do anything with the small object or the white substance. Although the intentional swallowing of contraband to prevent its confiscation by the police would otherwise be sufficient to sustain the charge, there was no allegation in the complaint that contraband was involved. Nor did the complaint allege that an order was given to defendant to do or not do anything with the object in his possession and that he refused to comply with that order.

Crimes
Tampering with Physical Evidence
Sufficiency of Accusatory Instrument-Swallowing Object

(2) An accusatory instrument charging defendant with attempted tampering with physical evidence (Penal Law §§ 110.00, 215.40 [2]) based upon his having swallowed a small object containing a white substance upon being approached by a plainclothes police officer who identified herself after observing defendant purchase the object from an unapprehended individual was dismissed for legal insufficiency (*see* CPL 100.15 [3]; 100.40 [1]) in the absence of any allegation that the police officer told defendant that he was under arrest or otherwise directed him not to do anything with the small object. The statute proscribes tampering with physical evidence "which is or is about to be produced or used as evidence in an official proceeding." Here, the police officer's identification alone was insufficient to demonstrate that defendant had knowledge of an "official proceeding" in the absence of any allegation of defendant's arrest or a direction constraining his behavior.

RESEARCH REFERENCES

Am Jur 2d, Obstructing Justice §§ 2, 34-37, 54-60, 63, 77.

McKinney's, Penal Law §§ 195.05, 215.40 (2).

NY Jur 2d, Criminal Law §§ 883, 885, 893, 4542, 4543, 4545, 4549, 4750-4753, 4756.

ANNOTATION REFERENCE

What constitutes obstructing or resisting officer, in the absence of actual force. 66 ALR5th 397.

***222** FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: obstruction /3 government! & facial /2 insufficiency /s accusatory

APPEARANCES OF COUNSEL

Lawrence M. Fagenson, New York City, for defendant. *Robert M. Morgenthau*, *District Attorney*, New York City (*Jonathan Chananie* of counsel), for plaintiff.

OPINION OF THE COURT

Marc J. Whiten, J.

The defendant, Paolo Berdini, is charged with a violation of Penal Law § 195.05 (obstruction of governmental administration in the second degree) and Penal Law §§ 110.00, 215.40 (2) (attempted tampering with physical evidence).

Defendant is charged with one count of each offense.

The defendant has moved by motion for the dismissal of the accusatory instrument for facial insufficiency.

The court has reviewed the defendant's motion papers, the People's response and all relevant statutes and case law, and, for the reasons discussed hereafter, decides the defendant's motion as follows:

Dismissal for Facial Insufficiency

The accusatory instrument, in pertinent part, charges defendant with the commission of the aforementioned crimes on April 17, 2007 at about 18:30 hours in front of 132 West 4th Street in the County of New York, State of New York, under the following circumstances:
"Deponent states that deponent observed defendant at the above location exchange United States currency for one small object with an unapprehended individual.
"Deponent is informed by Officer Kelly Wheeler, . . . that when informant approached defendant and identified herself as a police officer, informant observed defendant put a small object containing a white substance in defendant's mouth and swallow."

An information is facially sufficient if it contains nonhearsay factual allegations of an evidentiary character which establish, if true, every element of the offense charged and defendant's ***223** commission thereof (CPL 100.15 [3]; 100.40 [1]; *see* *People v Dumas*, 68 NY2d 729 [1986];*see also* *People v Alejandro*, 70 NY2d 133 [1987]). Where the factual allegations contained in an information "give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading." (*See* *People v Casey*, 95 NY2d 354, 360 [2000];*see also* *People v Konieczny*, 2 NY3d 569 [2004].)
Obstruction of Governmental Administration in the Second Degree (Penal Law § 195.05)
"A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act, or by means of interfering, whether or not physical force is involved, with radio, telephone, television or other telecommunications systems owned or operated by the state, or a county, city, town, village, fire district or emergency medical service or by means of releasing a dangerous animal under circumstances evincing the actor's intent that the animal obstruct governmental administration." (Penal Law § 195.05.)

Under New York law, arrest for obstructing governmental administration requires probable cause to believe that (1) a person prevented or attempted to prevent another from performing a function, (2) the other person was a public servant, (3) the function was an official action authorized by law, and (4) the obstruction was sought to be accomplished by means of intimidation, force or interference. (*See* *Diehl v Munro*, 170 F Supp 2d 311 [2001].)

Among the above requirements, the most important for our purpose is the fourth element pertaining to the obstruction by means of intimidation, force or interference. The statute prohibiting obstruction of governmental administration requires that the alleged obstruction be accomplished by either (1) intimidation or physical force or interference, or (2) an independently unlawful act. (*See* *People v Alston*, 9 Misc 3d 1046 [2005];*see also* *People v Offen*, 96 Misc 2d 147 [1978].)

(1)The case law clearly establishes that, in similar cases as the one at bar, legal sufficiency lies in the allegation that either ***224** contraband is involved, or an officer orders defendant to do or refrain from doing something. (*See People v Offen, supra*;*see also* *People v Brito*, 4 Misc 3d 1004[A],2004 NY Slip Op 50661[U] [2004]; *see* *People v Cameron*, 3 Misc 3d 1105[A], 2005 NY Slip Op 50430[U] [2004].)

In the case at bar, there is no allegation that the small object was contraband, no allegation that the white substance was contraband, no allegation that the small object exchanged was the same object as the white substance which was consumed, and no allegation that the police officer directed defendant to do, or abstain from doing, anything with the small object or the white substance.

In the People's response, they assert that the police had probable cause to seize the object that defendant swallowed,

if it in fact contained illegal drugs. There is no allegation in the complaint that contraband was involved.

A review of all relevant case law reveals the necessity for a clearly stated allegation that contraband was involved or the issuance of an order by law enforcement to defendant to do, or refrain from doing, something which defendant disobeyed. For example, an information alleging that the police officer observed defendant smoking a marijuana cigar, and that defendant placed the cigar behind his back as the officer approached, broke it into small pieces, and threw it into a patch of mulch, was sufficient to charge the crime of obstructing governmental administration in the second degree because the alleged conduct demonstrated defendant's intent to prevent the officer from retrieving the marijuana. (*See People v Mercedes*, 194 Misc 2d 731 [2003].)

Courts have held that the intentional swallowing of contraband to prevent its confiscation by the police was a manifestly physical act which affirmatively interfered with a police officer's duty to seize and preserve such contraband. The court found that the information properly alleged defendant's commission of the offense of obstructing governmental administration by means of such physical interference under section 195.05. (*See People v Ravizee*, 146 Misc 2d 679 [1990].)

Identifying oneself as a police officer, as is claimed in the instant case, cannot be equated with a direct order of an officer to a defendant to do or not do something. The complaint does not allege that an order was given to defendant to do or not to do anything with the object in his possession and that he refused to comply with that order. The plethoric number of cases dealing***225** with that issue, where legal sufficiency was found, have one common denominator: defendant's refusal to obey an officer's order. (*See People v Mitchell*, 17 Misc 3d 1103[A],2007 NY Slip Op 51805[U] [2007] [the accusatory instrument fails to indicate that the defendant's alleged act of swallowing a ziploc bag containing crack cocaine was done in response to any action or order of (the police officer), the allegations are insufficient to establish intent, a crucial element of the crime]; *see Matter of Quaniqua W.*, 25 AD3d 380 [1st Dept 2006] [juvenile refused to comply with officers' directives to leave the station, screamed, cursed, flailed her arms, and struggled with officers, who were attempting to maintain order in the station, which was an official police function]; *see also Allen v City of New York*, 480 F Supp 2d 689 [2007] [prison correction officers had probable cause to arrest inmate for obstructing governmental administration, under New York law based on unchallenged claim that inmate disobeyed direct order to enter dormitory section of prison].) The information here does not support the charge of obstructing governmental administration.

Therefore, the defendant's motion to dismiss the information based on the charge of obstructing governmental administration is granted.

Attempted Tampering with Physical Evidence (Penal Law §§ 110.00, 215.40)

"A person is guilty of tampering with physical evidence when:

"(1) With intent that it be used or introduced in an official proceeding or a prospective official proceeding, he (a) knowingly makes, devises or prepares false physical evidence, or (b) produces or offers such evidence at such a proceeding knowing it to be false; or

"(2) Believing that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he suppresses it by any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person." (Penal Law § 215.40.)

(2) A facially sufficient accusatory instrument charging defendant with tampering with physical evidence must allege that defendant, with intent to commit a crime, engaged in conduct that tended to effect commission of that crime, and specifically, ***226** that defendant, believing that certain physical evidence was about to be produced or used in an official proceeding or prospective official proceeding, intended to prevent such production or use by concealment, alteration or destruction. (*See People v Palmer*, 176 Misc 2d 813 [1998].)

Defendant, in the case at bar, upon being approached by a plain-clothed officer who observed him purchasing a small object containing white powder, swallowed the object when the officer identified herself as a police officer. The complaint does not allege that the object was contraband nor did the police tell him he was under arrest or not to do anything with the small object. Even where defendant was arrested, a court concluded that a charge of attempted tampering with physical evidence was not supported by preliminary hearing evidence that, when approached by police officers and informed that he was under arrest, defendant removed glassine envelope from his pocket and put it in his mouth. (*See* *People v Traynham*, 95 Misc 2d 145 [1978].)

The most important aspect in this analysis lies in the definition of official proceedings. The Penal Law defines official proceedings to mean "any action or proceeding conducted by or before a legally constituted judicial, legislative, administrative or other governmental agency or official, in which evidence may properly be received." (*See*Penal Law § 215.35 [2].) That definition indisputably refers to a forum broadly defined to include any legally constituted judicial, legislative or administrative proceeding.

This court finds sufficient evidence that the police officer herein, having observed defendant purchase a small object with a white powder, may have been engaged in an official proceeding, sufficient to comply with the statute, as she approached defendant and identified herself as a police officer.

The arrest and obtaining of evidence is clearly the tip of the spear of any prosecutorial proceeding. Therefore, any attempt to tamper with prospective evidence at such point must be actionable. Penal Law § 215.35 defines physical evidence as "any article . . . which is or is about to be produced or used as evidence in an official proceeding." A defendant upon arrest is afforded certain rights under law regarding his handling, questioning and the use of any evidence collected from or relating to him, for use at any criminal proceeding. This court finds that the words "which is or is about to be" extend to the period of the arrest when defendant's initial arrest related rights and ***227** protections attach. However, the charge must be dismissed as the accusatory instrument fails to allege the defendant had knowledge of said "official proceeding" sufficient from the police identification, absent at the very least, a statement of the defendant's arrest or further direction in some manner constraining defendant's behavior.

The information as it stands, without more, does not support the charge of attempted tampering with physical evidence.

Accordingly, the defendant's motion to dismiss the information based on the charge of attempted tampering with physical evidence is granted.

NY,2007.
PEOPLE v BERDINI

18 Misc.3d 221

END OF DOCUMENT

People v. Duran
25 Misc.3d 1210(A), 901 N.Y.S.2d 901
N.Y.City Crim.Ct. 2009.

25 Misc.3d 1210(A)901 N.Y.S.2d 901, 2009 WL 3199214, 2009 N.Y. Slip Op. 52020(U)

The People of the State of New York
v.
Claudia Duran, Defendant.
2009NY007914

Criminal Court of the City of New York, New York County

Decided on October 7, 2009

CITE TITLE AS: People v Duran

ABSTRACT

Crimes
Harassment
Text Messaging

People v Duran (Claudia), 2009 NY Slip Op 52020(U). Crimes-Harassment-Text Messaging. Penal Law-§ 240.30 (1) (Aggravated harassment, second degree). (Crim Ct, NY County, Oct. 7, 2009, Whiten, J.)

APPEARANCES OF COUNSEL

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OPINION OF THE COURT

Marc J. Whiten, J.

The defendant, Claudia Duran, is charged with twenty-six (26) counts, respectively, in violation of Penal Law ("PL") §240.30[1][a] and [b] (Aggravated Harassment in the Second Degree). The defendant has moved by omnibus motion for the following: (1) Dismissal of the accusatory instrument as facially insufficient, pursuant to CPL §§ 170.30[1][a] and 170.35[1]; (2) Dismissal of the accusatory instrument as unconstitutional; (3) Preclusion of evidence of defendant's prior convictions pursuant to *People v. Sandoval*; (4) Brady and Rosario; (5) a Bill of Particulars; and (6) Discovery. Upon the foregoing, the defendant's motion is decided as follows.

This court finds the information is facially sufficient, and that the claims as asserted are not violative of defendant's constitutional rights.

DISMISSAL OF THE ACCUSATORY INSTRUMENT

Facial Sufficiency

Defendant's facial insufficiency argument is without merit. An information is facially sufficient if it meets three requirements. First, it must substantially conform to the formal requirements of CPL §100.15. Additionally, the factual portion and any accompanying depositions must provide reasonable cause to believe the defendant committed the offense charged, as well as nonhearsay factual allegations of an evidentiary character which, if true, ***2** establish every element of the offense charged and defendant's commission thereof (CPL §§ 100.15[3] and 100.40[1]; *see People v Dumas*, 68 NY2d 729 [1986];*see also People v Alejandro*, 70 NY2d 133 [1987]). "The law does not require that the information contain the most precise words or phrases most clearly expressing the charge, only that the crime and the factual basis therefore be sufficiently alleged." (*People v Sylla*, 7 Misc 3d 8, 10 [App Term, 2d Dept 2005]). Additionally, where the factual allegations contained in an information "give an accused sufficient notice to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading." (*People v Casey*, 95 NY2d 354, 390 [2000];*see also, People v. Konieczny*, 2 NY2d 569 [2004]).

The factual part of the information, in pertinent parts, alleges the defendant committed the aforementioned crimes in the County and State of New York under the following circumstances:

Deponent states that from September 2, 2008, until November 7, 2008, deponent received approximately eighteen (18) text messages from the defendant. Deponent further states that in two (2) text messages on September 2, 2008, when deponent was inside of 1090 Amsterdam Avenue...the defendant's text messages stated in substance: I'M GONNA GET YOU. WHAT TIME YOU COMING OUT? YOU'RE A BAD FRIEND. YOU SHOULD HAVE TOLD ME TO MY FACE YOU WERE GOING TO SUE ME. YOU'RE A WHORE. Deponent further states that deponent is familiar with defendant's phone number and that said text messages were sent from defendant's phone number.

Deponent further states that on September 30, 2008, deponent received a package of papers in the mail addressed to her home address and with the handwritten return address of her lawyer in a private, personal injury suit against defendant's insurance company. Deponent further states that the above described paperwork contained numerous magazine clippings and insulting handwritten notes. Deponent further states that deponent is familar with defendant's handwriting, and recognizes the handwriting on this packet of paperwork to be that of the defendant.

Deponent further states that on November 7, 2008, deponent received approximately eight (8) text messages from the defendant, and that the defendant's text messages stated in substance: WHAT AN UNGRATEFUL BITCH YOU ARE. YOU'RE GOING TO BURN IN HELL. YOU'RE GONNA PAY FOR THIS. I HOPE THAT YOUR MONEY FROM YOUR LAW SUIT IS GONNA DO YOU WELL TO BUY YOU FAKE ASS FRIENDS. HOPEFULLY YOU DON'T GET BACK TO WORK BECAUSE NOW YOU ARE CRIPPLED. YOUR MONEY IS GONNA GO WITH YOUR CRIPPLED SELF AND YOUR CRIPPLED CAR. HOPEFULLY YOU DONT (sic) COME BACK TO WORK CUZ YOU'RE GONNA SEE WHAT YOU'RE GONNA PAY FOR. HOPEFULLY GOD FORGIVES YOU FOR THIS YOU'RE DOING. NOW YOU'RE A RIDICULOUS CRIPPLED FAKE ASS FAKE BITCH IDIOT. Deponent further states that these messages were sent from an anonymous email address, but that deponent knows they were sent by defendant given the context of the messages and that said messages were consistent with the past messages from defendant's phone and the above ***3** described mailed materials.

"A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she: (a) communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm; or (b) causes a communication to be initiated by mechanical or electronic means or otherwise with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm." (PL §240.30[1] [a] and [b]).

As stated above, defendant seeks dismissal of the charges as facially insufficient on the grounds that the factual allegations fail to support the elements of the offense. Specifically, defendant contends the complaint fails to set forth facts which support that she acted with the requisite intent "to harass, annoy, threaten or alarm another person...in a manner likely to cause annoyance or alarm," (PL §240.30[1][a] and [b]), inasmuch as the alleged communications are innocuous in tone and contend. This court disagrees and finds the factual allegations set forth are sufficient to support the charge.

An information is sufficient if it alleges facts which provide reasonable cause to believe the defendant acted with the requisite *mens rea*. (*People v. Inserra*, 4 NY3d 30 [2004][element that defendant had knowledge of order of protection satisfied by allegation that defendant's name appeared on signature line of such order]). Moreover, a defendant's intent may be inferred from the act itself or from defendant's conduct and surrounding circumstances. (*See*, *People v Chandler,* 20 Misc 3d 139(A) [App Term 1st Dept. 2008]; *People v Miguez*, 153 Misc 2d 442 [App. Term, 1st Dept. 1992]; *People v McGee*, 204 AD2d 53 [2d Dept 1994]; *People v Bracey*, 41 NY2d 296 [1977]).

In the instant matter, defendant does not contest making the communications, which on their face provide reasonable cause to believe that it was defendant's conscious purpose to harass or at minimum to cause annoyance to the complainant. Moreover, defendant's intent to harass, annoy, threaten or alarm the complainant, a party in a civil suit against defendant, is fairly inferable from the factual allegations purporting that defendant sent numerous text messages, totaling fifty-two contacts, that contained statements, such as "*I'm gonna get you. What time you coming out? You're a bad friend. You should have told me to my face you were going to sue me. You're a whore",* which could fairly be characterized at minimum as annoying. (See, *People v Chandler,* 20 Misc 3d at 53*citing People v. Johnson*, 208 AD2d 1051, 1052 [1994],*see also, People v. Miguez*, supra). Those factual assertions and the alleged volume of communications, "*given a fair and not overly restrictive or technical reading*," (*People v. Casey*, 95 NY2d 354, 360 [2000], are sufficient for pleading purposes to establish that the defendant acted with the intent to harass, annoy or alarm by transmitting numerous text messages and sending by mail insulting clippings, sufficient to support the charge of Harassment in the Second degree. (PL 240.30[1]). Finally, whether defendant's communications were ***4** innocuous in tone and contend, and thus not rising to a level resulting in harassment, annoyance, threat or alarm is an issue for the trier of facts to determine. (*People v. Shack,* 86 NY2d 529, 665 [1995][Post trial prosecution premised on privacy interest in an individual's right to be free from unwanted telephone calls]; see conversely, *People v. Dietze*, 75 NY2d 47, 51-52 [1989][Post trial prosecution premised on alleged communicated threats]).

Accordingly, this court finds that the information is facially sufficient, inasmuch as the non-hearsay factual allegations clearly set forth the offense allegedly committed, and give the defendant sufficient notice to prepare a defense while ensuring that she would not be tried twice for the same offense. (*See People v. Kalin*, 12 NY3d 225 [2009]).

Dismissal of Complaint as Unconstitutional

It is of note that even Freedom has its limits and barriers, usually measured by that point where one's actions violate the right of another. (*See, People v. Shack*, 86, NY2d 529, 535 [1995]["An individual's right to communicate must be balanced against the recipient's right to be let alone' in places in which the latter possesses a right to privacy"]). As Samuel Hendel; noted scholar, writer, and philosopher wrote, ". . .the fact, in short, is that Freedom, to be meaningful in an organized society must consist of an amalgam of hierarchy of freedoms and restraints."

As stated above, the defendant moves to dismiss the information contending that as applied to her, PL 240.30[1][a] and [b] is unconstitutional. Relying on *People v. Dietze*, *supra*, and *People v. Shack, supra,* the defendant argues that the communications, as alleged, are within the purview of her constitutionally protected right to free speech, as the alleged communications fail to contain excessive profanity, fighting words, provocative words, or threats.[FN1] This court disagrees and denies defendant's motion, finding defendant's reliance on *People v Dietze* and *People v Shack* misplaced.

It is a well settled Black Letter law that freedom of expression, pursuant to the First Amendment protections of the United States Constitution, is not absolute. (*See, Chaplinsky v New Hampshire,* 315 US 568, 571 [1942]). Accordingly, certain speech directed at an individual "which by their very utterance inflict injury or tend to incite an immediate breach of peace" are deemed unprotected. (*Chaplinsky* at 571-72). Moreover, as in the case at bar, "epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under [the Constitution]." (*Chaplinsky*, at 572*citation omitted*). By the same accord, the Court of Appeals ***5** reiterated the same sentiment in *People v. Shack, supra*, stating that free speech is not absolute and that "a person's right to free expression may be curtailed upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.'" (*Id* at 535-536).

Turning to the case at bar, if this court, as defendant suggests, were to focus solely on defendant's statements, it may appear that the alleged statements are innocuous, inasmuch as they may fail to pose an immediate threat, are therefore within the purview of protected free speech. (See, *People v Dietze, supra*). However, the place and circumstances surrounding the statement are also factors in determining whether particular speech is protected by the First Amendment. (*See, Chaplinsky* at 571-72). Defendant relies on the holding in *People v. Dietze, supra*, where the Court of Appeals held that calling the complainant a "bitch" and her son a "dog" on a public street was protected speech under the First Amendment and the New York State Constitution. (*Dietze* at 50). Despite defendant's reliance on the Court of Appeals holding in *People v. Dietze*, Dietze is distinguishable from the case at bar, as the Penal Law section at issue was section 240.25 and the communications alleged, although directed at individuals were made on a public street and did not invade the complainant's privacy interests.

In *People v. Dietze*, supra, the Court of Appeals declared the Harassment section 240.25(2) of the Penal Code unconstitutional, finding that unless prohibited speech "presents a clear and present danger of some serious substantive evil, it may neither be forbidden nor penalized" and that to prohibit abusive, vulgar or obscene language in public because it harassed, annoyed or alarmed another person infringed on an individual's protected right to Free Speech. (*Dietze* at 51). Even so, the court did acknowledge that imminent "genuine threats of physical harm fall within the scope of the statute" PL 240.25[1] and therefore, outside the purview of the First Amendment protections. (Id at 54). However, unlike innocuous threats under PL 240.25, the Court of Appeals, upholding the constitutionality of PL 240.30 as applied, in *People v. Shack, supra*, held that in the context of PL 240.30, "an individual has a substantial privacy interest in his or her telephone" to be free from unwanted calls, so much so as to limit a caller's right to free speech. (Id at 665). The court opined that PL 240.30 criminalized harassing conduct that invaded an individual's privacy, it did not criminalized speech. (*Shack* at 665, see also, *People v. Mangano*, 100 NY2d 569, 571 [2003] [PL 240.30 not unconstitutionally applied when criminal liability arises from harassing conduct and not from expression.]; *People v. Dupont*, 107 AD2d 247, 251 [App Div 1st Dept 1985][PL 240.30 applies to "the violation of one's privacy by means of obscene telephone calls.]; *see also, People v. Kochanowski*, 186 Misc 2d 441, 444 [App

Term 1st Dept 2000]). Therefore, ”[a]n individual's right to communicate must be balanced against the recipient's right to be let alone' in the places in which the latter possesses a right to privacy.“(*People v Shack* at 535 [*citation omitted*]).

Applying the foregoing to the instant matter, the defendant herein is not being ***6** prosecuted for her speech, but rather, her culpability arises from harassing conduct, which is not entitled to constitutional protections. (*See, People v. Shack, supra,* at 536). The allegation that defendant sent the complainant fifty-two (52) text messages, if true, is understandably harassing or at minimum an annoying invasion of an individual's privacy interests to be free from unwanted telephone calls. (*See, Shack, supra,* at 665). Moreover, irrespective of the communication, it is clear from the allegations that defendant's alleged criminal culpability under PL 240.30 arises from defendant's invasive repetitive conduct, and therefore, PL 240.30 was not unconstitutionally applied. (*See, People v. Shack, supra*, at 536; see also, *People v Mangano*, supra).

For the foregoing reasons, defendant's motion to dismiss on constitutional grounds is denied.

REMAINING MOTIONS

Defendant's *Sandoval* application is deferred to the trial court. The People are reminded of their continuing obligation to supply Brady and Rosario materials. The defendant's motion seeking Bill of Particulars is granted to the extent required by CPL §200.95 and not previously provided by the People's Affirmation in Opposition and Voluntary Disclosure Form. The defendant's motion for pretrial discovery is granted to the extent provided in the Voluntary Disclosure Form included with the People's response.

This opinion constitutes the decision and order of the Court.

Dated:New York, New York_____

October 7, 2009Marc J. Whiten, JCC

FOOTNOTES

FN1. Pursuant to the 14th Amendment of United State Constitution, the First Amendment protections are applicable to the states. (*see*U.S. Const Amendment XIV; *Schneider v. New Jersey*, 308 US 147, 160 [1939];*see also* NY Const, Art I, §8).

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24 Misc.3d 1229(A)899 N.Y.S.2d 62, 2009 WL 2357010, 2009 N.Y. Slip Op. 51664(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

The People of the State of New York
v.
Sean Everson, Defendant.
2009NY005871

Criminal Court of the City of New York, New York County

Decided on July 21, 2009

CITE TITLE AS: People v Everson

ABSTRACT

Crimes
Information

Crimes
Assault
Substantial impairment of physical condition or substantial pain

People v Everson (Sean), 2009 NY Slip Op 51664(U). Crimes-Information. Crimes-Assault-Substantial impairment of physical condition or substantial pain. (Crim Ct, NY County, July 21, 2009, Whiten, J.)

APPEARANCES OF COUNSEL

For the People:
New York County District Attorney's Office
ADA Erin Choi, Esq.
For the Defense:
The Legal Aid Society
Nicole V. Bromberg, Esq.

OPINION OF THE COURT

Marc J. Whiten, J.

The defendant, Sean Everson, is charged with violating Penal Law § 120.00 [1], assault in the third degree. The defendant has filed an omnibus motion seeking the dismissal of the information as facially insufficient pursuant to CPL §§ 170.30 and 170.35, as well as for various other reliefs.

Defendant's facial insufficiency argument is without merit. An information is facially sufficient if it meets three requirements. First, it must substantially conform to the formal requirements of CPL §100.15. Additionally, the factual portion and any accompanying depositions must provide reasonable cause to believe the defendant committed the offense charged, as well as nonhearsay factual allegations of an evidentiary character which, if true, establish every element of the offense charged and defendant's commission thereof (CPL §§100.15[3] and 100.40[1]; *see People v Dumas*, 68 NY2d 729 [1986];*see also People v Alejandro*, 70 NY2d 133 [1987]). "The law does not require that the information contain the most precise words or phrases most clearly expressing the charge, only that the crime and the factual basis therefor be sufficiently alleged" (*People v Sylla*, 7 Misc 3d 8, 10 [App Term, 2d Dept 2005]). Furthermore, where the factual allegations contained in an information "give an accused sufficient notice to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading." (*People v Casey*, 95 NY2d 354, 390 [2000]).

The court finds the factual allegations sufficient to establish the elements of the charge. The information alleges that at 16:42 hours on January 21, 2009 at 2175 2nd Avenue in the County and State of New York the informant "observed defendant and three other individuals approach and surround informant," thereby preventing him from leaving the location. The information further alleges that "an unapprehended individual then approached the informant ***2** and did strike informant about the abdominal area with a closed fist, causing redness and swelling to the informant's abdominal area and causing substantial pain."

Penal Law § 120.00[1] provides that: "[a] person is guilty of assault in the third degree when: [w]ith the intent to cause physical injury to another person, he causes such injury to such person or a third person." Thus, the facts alleged in the information must satisfy two elements: 1) the intent to cause "physical injury" and 2) that such "physical injury" resulted. Physical injury is defined as "impairment of physical condition or substantial pain." (Penal Law §10.00[9])

Defendant contends the accusatory instrument is facially insufficient because it fails to identify the defendant as the individual who intentionally caused physical injury to the informant. Defendant's argument is two fold. First, the defendant argues that there is "no causal connection between the alleged assault and the defendant's conduct of surrounding" the informant. In addition, the defendant argues that the complaint fails to allege that "the defendant surrounded the informant with the intent of causing physical injury, or that the defendant's actions enabled or encouraged the unapprehended individual to assault" the informant. This court finds the defendant's arguments are misguided.

Penal Law § 20.00 provides that, "[w]hen one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, [he or she]. . .intentionally aids such person to engage such conduct." Accordingly, a defendant may be found criminally liable as the actual perpetrator or as an accomplice who aids, enables, or shares a "community of purpose". (PL § 20.00 at 54; *see also*, *People v. Mateo*, 2 NY3d 383 [2004] (finding criminal liability attaches to "a person concerned in the commission of a crime whether he directly commits the act constituting the offense or aids and abets in its commission...").

Moreover, in *People v. Allah*, the Court of Appeals found that accomplice culpability may be found even when the assistance is unplanned, if the totality of the evidence establishes the defendant "knowingly participated and continued to participate even after his companion's intentions became clear...[and the] defendant shared a community of purpose with his companion." (*People v Allah*, 71 NY2d 830, 831, 832 [1988]). Similarly, in *Matter of Kadeem W.*, the court found the evidence supported that a 13 year old was an accessory to and shared the intent of

his companion's conduct of firing several air gun shots at a security guard, even though defendant never fired the gun but merely taunted and threatened the guard. (*Matter of Kadeem W.*, 2005 NY Slip Op 8848, 5 NY3d 864, 865 (2005); *see People v Staples*, 19 AD3d 1096 [4d 2005](where the court held evidence sufficient that "while only one person used the knife that inflicted the stab wounds, defendant was part of a group of at least four people who acted with a community of purpose); see also, *People v. Rivera*, 84 NY2d 766, 770 [1995] ("There is no distinction between liability as a principal and criminal culpability as an accessory").).

In the present matter, the information alleges that the defendant surrounded the informant and prevented his escape. Although this court acknowledges that the defendant did not punch the informant with his closed fist, the defendant was one of three men that approached and surrounded the complaining witness and prevented him from leaving. (*See, People v. Staples, supra*). Such action clearly aided and enabled the principal's conduct of striking the informant. (*See, People v. Rivera, supra*). Given the totality of circumstances, this court can reasonably infer that the defendant shared a "community of purpose " with his companion to assault the informant. (See, PL §20.00 at 54; *see also*, *People v. Rivera*; supra.).***3** Steven Buchholz and Thomas Roth, authors of "Creating the High - Performance Team " (1987) defined "Synergism" as "the simultaneous actions of separate entities which together have greater total effect than the sum of their effects." If the allegations in the complaint are proven, the exhibited synergism of the actors in the instant matter is undeniable. Therefore, the factual allegations viewed in a light most favorable to the People, (*People v Cabey*, 85 NY2d 417, 420 [1995]), and "given a fair and not overly restrictive or technical reading, " *People v. Casey*, 95 NY2d 354, 360 [2000], are sufficient for pleading purposes to establish the causal connection between the alleged assault and defendant's conduct to support a prima facie case of assault in the third degree.

Defendant's second argument contends the information fails to state that the informant suffered a physical injury. Specifically, defendant argues that the allegations of "swelling" and "redness" to the abdominal area and "substantial pain" fail to meet the standard of "physical injury" pursuant to Penal Law §10.00[9], which defines "physical injury" as the "impairment of physical condition or substantial pain." Moreover, defendant argues that the alleged injuries to the informant "are neither specific nor severe enough to reach the threshold objective level of physical impairment or substantial pain required by the statute" and that the court cannot "reasonably infer any likelihood of worsening injuries as a result of the [informant's] having been punched in the abdomen, especially in the absence of any allegation that medical treatment or a hospital visit was required."

In his argument defendant relies on Matter of Philip A. and its progeny, as well as the decision of a sister court, *People v. DiPoumbi*, 2008 NY 068631 [NY Crim. Ct. NY Co. 2009]. However, this court finds the defendant's reliance and argument unpersuasive. In *Matter of Philip A.*, *supra*, the Court of Appeals addressed the issue of what constitutes sufficient "substantial pain" to support a conviction beyond a reasonable doubt. (*Matter of Philip A.* at 200). The Court held that "petty slaps, shoves, kicks and the like delivered out of hostility, meanness and similar motives are not within the definition" of physical injury. (*Matter of Philip A*. at 200, *citing* Temp Commn on Rev of Pen Law and Crim Code, Proposed Pen Law, at 330). Nonetheless, the present case is distinguishable from *Matter of Philip A.,* inasmuch as that decision involved a conviction after trial, "where the people were required to prove physical injury beyond a reasonable doubt, whereas [the present case] involves a motion to dismiss the accusatory instrument in which...[t]he People are only required to prove a prima facie case. (*People v Williams*, 5/4/90 N.Y.L.J. 25, (col. 2), aff 180 Misc 2d 313 [1999]).

In *People v. Henderson*, 92 NY2d 677, 680 [1999], the Court of Appeals addressed the facial sufficiency challenge of a misdemeanor accusatory instrument charging assault in the 3rd degree, whereby the information alleged the defendant and another pulled and kicked the complaining witness from a scooter resulting in contusions and swelling, as well as substantial pain. (*People v. Henderson, supra*, at 680). In finding the accusatory instrument sufficient, the *Henderson* court held that "*under the prima facie case requirement. . .the information must set forth sufficient factual allegations to warrant the conclusion that the victim suffered an impairment of physical condition*

or substantial pain." (Id at 680 internal citations omitted). Moreover, the Henderson court emphasized "that the prima facie case requirement is not the same as the burden of proof beyond a reasonable doubt required at trial" *(People v. Henderson* at 680*citations omitted*) and "that [u]nder these circumstances, allegations of substantial pain, swelling and contusions, following kicks, must be deemed sufficient to constitute physical injury' to support a facially valid local criminal court information." (*People v. Henderson* at 681.).***4**

Accordingly, in a recent decision, this court denied a defendant's pre-trial motion to dismiss finding the allegations that the defendant's punching of a corrections officer and the officer's subsequent loss of breath as a result of that punch were sufficient to support impairment of physical condition or substantial pain under Penal Law § 10.00. (*People v Garcia*, 2009 NY Slip Op 5116U). Similar to *People v Henderson* and *People v. Garcia*, in the present matter, the informant describes and details the location and nature of his injury, inasmuch as the information states that the informant was punched in the abdominal area and suffered redness, swelling, and substantial pain. Moreover, as it is well settled that pain is subjective (*see, Matter of Philip A*, at 200, *supra, see also People v. Henderson at 681*) and that an accusatory instrument is jurisdictionally sufficient if the allegations set forth a prima facie case supporting a reasonable cause to believe the defendant committed the offense charged so as to protect the defendant from being tried twice for the same offense. (*See*, *People v. Casey*, supra, see *also, People v. Henderson*, supra;*People v. Rivera*, supra). This court finds the alleged physical injury resulting in redness and swelling to the abdominal area and substantial pain, as well as the manner in which those injuries were inflicted, viewed in the light most favorable to the People, if true, is sufficient for pleading purposes to establish "physical injury" supporting the charge of assault in the third degree. Finally, the court finds that the issue regarding the quality of the injury and whether or not the People have proven "impairment of physical condition or substantial pain" is a matter for the trier of fact to determine. (*See, Matter of Philip A*, at 200; *see also People v. Henderson*, supra).

Therefore, for the reasons set forth, defendant's motion to dismiss the accusatory instrument as facially insufficient is DENIED.

REMAINING MOTIONS

Defendant's motion to suppress statements is GRANTED to the extent of ordering a *Huntley/Dunaway* hearing. Defendant's motion to suppress identification evidence is GRANTED to the extent of ordering a *Wade/Dunaway* hearing. Defendant's motion to preclude statements for which the People, pursuant to CPL §710.30[3], have not given proper notice is GRANTED. The *Sandoval* application is deferred to the trial court.

This constitutes the decision and order of the Court.

New York, New York_____

Dated:July 21, 2009Hon. Marc J. Whiten, JCC

N.Y.City Crim.Ct. 2009.
People v Everson

24 Misc.3d 1229(A)

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23 Misc.3d 1137(A), 889 N.Y.S.2d 506
N.Y.City Crim.Ct. 2009.

23 Misc.3d 1137(A)889 N.Y.S.2d 506, 2009 WL 1619946, 2009 N.Y. Slip Op. 51161(U)

The People of the State of New York
v.
SERGIO GARCIA, Defendant.
2009NY017018

Criminal Court of the City of New York, New York County

Decided on June 10, 2009

CITE TITLE AS: People v Garcia

ABSTRACT

Crimes
Assault
Substantial Impairment of Physical Condition

People v Garcia (Sergio), 2009 NY Slip Op 51161(U). Crimes-Assault-Substantial Impairment of Physical Condition. (Crim Ct, NY County, June 10, 2009, Whiten, J.)

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For the Defense:
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Elizabeth Fischer, Esq.
Under the supervision of Thomas Giovanni

OPINION OF THE COURT

Marc J. Whiten, J.

The defendant, Sergio Garcia, is charged with violating Penal Law (PL) §120.00[1], assault in the third degree; PL §120.00[3], assault in the third degree; and PL § 205.30, resisting arrest. The defendant filed an omnibus motion seeking: (1) Dismissal of the accusatory instrument as facially insufficient, pursuant to CPL §§ 170.30[1][a] and

170.35[1]; (2) Suppression of statement evidence or a *Huntley/Dunaway* hearing; (3) Preclusion of identification evidence and statements for which proper notice was not given by the People; (4) Preclusion of evidence of defendant's prior convictions pursuant to *People v. Sandoval*; (5) a bill of particulars; (6) discovery pursuant to CPL § 240.40; and (7) any such other relief the court may deem proper. Upon the foregoing, the defendant's motion is granted in part, and denied in part.

FACIAL SUFFICIENCY

For jurisdictional purposes a criminal court information is sufficient on its face when it contains non-hearsay factual allegations that establish, if true, every element of the crimes charged and the defendant's commission thereof. Criminal Procedure Law (CPL) §§ 100.15[3], 100.40[4][b]; *People v Henderson*, 92 NY2d 677, 679 [1999];*People v Alejandro*, 70 NY2d 133 [1987];*People v Dumas*, 68 NY2d 729 [1986]). When considering a facial sufficiency claim, this Court must read the allegations in the light most favorable to the People. (CPL § 170.45; *People v Jennings*, 69 NY2d 103, 114 [1986]). In general, as long as the factual allegations of an information conform to the pleading requirements of Article 100 of the CPL, and the allegations contained in an information "give an accused sufficient notice to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should ***2** be given a fair and not overly restrictive or technical reading" (*People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006];*People v Casey*, 95 NY2d 354, 360 [2000]).

ASSAULT IN THE THIRD DEGREE

Penal Law 120.00 provides that "a person is guilty of assault in the third degree when: 1. with intent to cause physical injury to another person, he causes such injury to such person or to a third person; . . . or 3. with criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument." PL § 120.00[1] and [3].

The relevant portion of the accusatory instrument reads as follows:

"Deponent states that he and Officer Smith are employed as Corrections Officers in the pens at the above location. Deponent and other officers ordered the defendant and other inmates to move from one holding pen to another. As defendant exited one holding pen, deponent observed the defendant punch Officer Smith in the chest, thereby causing Smith to appear to lose his breath momentarily. When deponent and other officers attempted to subdue the defendant for the above actions, the defendant flailed his arms and struggled in order to avoid being apprehended, thereby pulling several officers, including Officer Smith, to the ground. Deponent further observed that as a result of this altercation, Officer Smith had swelling and redness to the hand."

Defendant argues the allegation that defendant "punched Officer Smith in the chest, thereby causing Smith to appear to lose his breath momentarily" is insufficient inasmuch as, the allegations fail to establish the victim's impairment of physical condition or substantial pain. Reading this case in the light most favorable to the People , the court disagrees with defendant's contentions, finding the allegations sufficient to support impairment of physical condition or substantial pain. Causing someone to be unable to breath, albeit momentarily, clearly supports an impairment of a person's physical condition, i.e. - breathing, which in the case at bar is directly attributable to the defendant's alleged actions. In the medical field (and as every First Class Boy Scout is trained) it is well settled that among the three most exigent medical "hurry cases" for first aid purposes are 1) heart attack, 2) severe bleeding and 3) impairment of breathing. Such conditions are considered to be potentially life threatening as they relate to fundamental systems necessary to the continuation of bodily function. The even momentary compromise of any such function, is of great concern to the overall integrity of the human body. Such compromise therefore clearly fits within the meaning of the statue.

Accordingly, defendant's motion to dismiss PL § 120.00[1], assault in the third degree is denied.

Defendant also argues that the count charging defendant with violating PL § 120.00[3] is insufficient inasmuch as, the complaint fails to contain allegations establishing he used a deadly weapon or dangerous instrument. As stated above, PL § 120.00[3] requires that a defendant cause "physical injury to another person by means of a deadly weapon or a dangerous instrument." In the case at bar, the court finds the allegation that the deponent observed the defendant "punch Officer Smith in the chest" fails to support conduct that remotely alleges the use of a deadly weapon or a dangerous instrument. Accordingly, the count charging the defendant with violation PL ***3** § 120.00[3] must be dismissed for lack of facial sufficiency.

RESISTING ARREST

A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person. PL § 205.30. Defendant argues that the count charging the defendant with resisting arrest is insufficient. Specifically, defendant states that resisting arrest involves conduct occurring at the time of arrest itself. Defendant argues:

"that at the time Mr. Garcia is alleged to have resisted arrest he was in the pens at 100 Centre Street awaiting arraignment, the Corrections Officers could not have been effecting an arrest of him, but were instead retaining him in custody. He had already been deprived of his liberty when he was originally arrested and remained in custody when he was placed in the pens. Therefore, the Corrections Officers' actions were not depriving him of liberty and cannot meet the definition of effecting an arrest."

First, the complaint is silent as to when in the arrest to arraignment process this alleged altercation occurred. Defendant contends that the altercation occurred while he awaited arraignment. However, based on the allegations contained in the complaint, if the defendant was not released after arraignment, the altercation could have easily taken place after the defendant's arraignment. Furthermore, a defendant's status of awaiting arraignment or trial while incarcerated does not preclude the state from taking action against such a defendant who allegedly commits a new and separate crime while incarcerated.

In the instant matter defendant was in the custody of the department of corrections. Whether he was awaiting arraignment or being processed after arraignment is unclear from the complaint and of no importance in judging the sufficiency of the complaint. While in the pens defendant is alleged to have assaulted a New York City Corrections Officer. When the Correction Officers attempted to arrest defendant for allegedly committing this new assault, defendant is alleged to have "flailed his arm and struggle to avoid being" arrested for this assault and "thereby pulling several officers to the ground."

Accordingly, the court finds the allegations when read in the light most favorable to the People, "given a fair and not overly restrictive or technical reading," *People v. Casey*, 95 NY2d 354, 360 [2000], are sufficiently evidentiary in character, for pleading purposes, to support the charge of resisting arrest, as well as sufficiently evidentiary in character to give the defendant notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense.*People v. Casey at 360*. Therefore, defendant's motion to dismiss the charge of resisting arrest must be denied.

REMAINING MOTIONS

The defendant's request to suppress statements allegedly made by the defendant is granted to the extent of ordering a *Huntley/Dunaway* hearing; defendant's request for a bill of particulars and discovery pursuant to CPL § 240.40 is granted to the ***4** extend provided for in the People's voluntary disclosure form (VDF); defendant's request for a *Sandoval* and *Molineux* hearing is deferred to the trial court; defendant's request reserving the right to make additional motions as necessary is granted to the extent provided for by CPL § 225.50.

The foregoing constitutes the decision and order of the Court.

Dated:New York, NY

June 10, 2009

_____

HON. MARC J. WHITEN, JCC

N.Y.City Crim.Ct. 2009.
People v Garcia

23 Misc.3d 1137(A)

END OF DOCUMENT

People v. Klapper
28 Misc.3d 225, 902 N.Y.S.2d 305
NY,2010.

28 Misc.3d 225902 N.Y.S.2d 305, 2010 WL 1704796, 2010 N.Y. Slip Op. 20150

The People of the State of New York, Plaintiff
v
Andrew Klapper, Defendant.
Criminal Court of the City of New York, New York County

April 28, 2010

CITE TITLE AS: People v Klapper

HEADNOTE

Crimes
Unauthorized Use of Computer
Sufficiency of Accusatory Instrument—Employer's Accessing Employee's Personal E-Mail Account on Work Computer

An accusatory instrument charging defendant with unauthorized use of a computer (Penal Law § 156.05) based upon allegations that he installed keystroke-tracking software on his employee's work computer and then improperly accessed the employee's personal e-mail account was dismissed as being facially insufficient and jurisdictionally defective due to the failure to establish the required element of "without authorization." The statute was not intended to criminalize "mere use or access," but rather to protect against knowing intrusions. The allegations were devoid of facts demonstrating that defendant had notice of any prohibition or limitation regarding access, and thus failed to establish that defendant's access to the computer and e-mail exceeded his authorized access as the computer owner and complainant's employer. Furthermore, the allegations also failed to establish that defendant circumvented a security device or password or that complainant had installed any security protections to prevent defendant's authorization or access to the computer or e-mail account.

RESEARCH REFERENCES

Am Jur 2d, Indictments and Informations § 276.

McKinney's, Penal Law § 156.05.

NY Jur 2d, Criminal Law: Substantive Principles and Offenses § 1019.

ANNOTATION REFERENCE

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems. 51 ALR4th 971.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: unauthorized /2 use /4 computer /p dismiss!

APPEARANCES OF COUNSEL

Law Office of Robert E. Brown, New York City, for defendant. *Cyrus R. Vance*, *Jr.*, *District Attorney*, New York City (*Gregory LeDonne* of counsel), for plaintiff.
***226**

OPINION OF THE COURT

Marc J. Whiten, J.
In this day of wide dissemination of thoughts and messages through transmissions which are vulnerable to interception and readable by unintended parties, armed with software, spyware, viruses and cookies spreading capacity, the concept of Internet privacy is a fallacy upon which no one should rely.

It is today's reality that a reasonable expectation of Internet privacy is lost, upon your affirmative keystroke. Compound that reality with an employee's use of his or her employer's computer for the transmittal of non-business-related messages, and the technological reality meets the legal roadway, which equals the exit of any reasonable expectation of, or right to, privacy in such communications.

In the case at bar, the defendant, Andrew Klapper, is charged with unauthorized use of a computer under Penal Law § 156.05. By omnibus motion, the defendant moves to dismiss the charge as facially insufficient and for various other relief. For the following reasons, defendant's motion to dismiss for facial insufficiency is granted.

****2** Facial Sufficiency

In order to be facially sufficient, an information must substantially conform to the formal requirements of CPL 100.15. Additionally, the factual portion and any accompanying depositions must provide reasonable cause to believe the defendant committed the offense charged, as well as nonhearsay factual allegations of an evidentiary character which, if true, establish every element of the offense charged and defendant's commission thereof (CPL 100.15 [3]; 100.40 [1]; *see People v Dumas*, 68 NY2d 729 [1986];*see also People v Alejandro*, 70 NY2d 133 [1987]).

The requirement of nonhearsay allegations has been described as a "much more demanding standard" than a showing of reasonable cause alone (*People v Alejandro*, 70 NY2d at 139, quoting 1968 Rep of Temp St Commn on Rev of Penal Law and Crim Code, Introductory Comments); however, it is nevertheless a much lower threshold than the burden of proof beyond a reasonable doubt (*People v Henderson*, 92 NY2d 677, 680 [1999];*People v Hyde*, 302 AD2d 101 [1st Dept 2003]). Thus, "[t]he law does not require that the information contain the most precise words or phrases most clearly expressing the charge, only that ***227** the crime and the factual basis therefor be sufficiently alleged" (*People v Sylla*, 7 Misc 3d 8, 10 [2d Dept 2005]). Finally, where the factual allegations contained in an information "give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 360 [2000];*see also People v Konieczny*, 2 NY3d 569 [2004];*People v Jacoby*, 304 NY 33, 38-40 [1952];*People v Knapp*, 152 Misc 368, 370 [1934],*affd* 242 App Div 811 [1934];*People v Allen*, 92 NY2d 378, 385 [1998];*People v Miles*, 64 NY2d 731, 732-733 [1984];*People v Shea*, 68 Misc 2d 271, 272 [1971]; *People v Scott*, 8 Misc 3d 428 [Crim Ct, NY County 2005]).

The factual portion of the accusatory instrument alleges, in pertinent parts, that
"[d]eponent is informed by a first individual known to the District Attorney's Office that the defendant installed software on a computer at the defendant's office that recorded the keystrokes entered by the users of said computer.
"Deponent further states that deponent is further informed by a second individual known to the District Attorney's Office that said second individual was an employee at the defendant's office and was instructed by the defendant to use only the above mentioned computer. Deponent further states that deponent is further informed by said second individual that said second individual then used the above-mentioned computer for work-related purposes, including to access and use a personal e-mail account.
"Deponent further states that deponent is further informed by the first individual that the software installed by the defendant on the above-mentioned computer recorded the password for the e-mail account of the second individual. Deponent further states that deponent is further informed by the first individual that said first individual observed the defendant access the second individual's e-mail account and print copies of computer data and computer material contained within the second ****3** individual's e-mail account.
"Deponent further states that deponent is further informed by the second individual that the defendant***228** e-mailed said second individual an electronic document that contained portions of e-mails generated from said second individual's e-mail account. Deponent further states that deponent is further informed by said second individual that the defendant had no permission or authority to access said second individual's personal e-mail account or to take or use any computer data, computer material, or other electronic information stored in said second individual's personal e-mail account."

A person is guilty of unauthorized use of a computer when he or she knowingly uses, causes to be used, or accesses

a computer, computer service, or computer network without authorization. (Penal Law § 156.05.) A computer is defined as
"a device or group of devices which, by manipulation of electronic, magnetic, optical or electrochemical impulses, pursuant to a computer program, can automatically perform arithmetic, logical, storage or retrieval operations with or on computer data, and includes any connected or directly related device, equipment or facility which enables such computer to store, retrieve or communicate to or from a person, another computer or another device the results of computer operations, computer programs or computer data." (Penal Law § 156.00 [1].)

A computer service includes "any and all services provided by or through the facilities of any computer communication system allowing the input, output, examination, or transfer, of computer data or computer programs from one computer to another." (Penal Law § 156.00 [4].) Under the statute, to access a computer, computer service or computer network means "to instruct, communicate with, store data in, retrieve from, or otherwise make use of any resources of a computer, physically, directly or by electronic means." (Penal Law § 156.00 [7].)

Therefore, in sum, to support the charge the allegations must allege facts of an evidentiary nature to establish that defendant (1) knowingly used or accessed a computer or services; (2) without authorization.

At issue before this court is whether the above allegations are sufficiently pleaded to support the charge of unauthorized computer use. Specifically, the element of "without authorization."

Defendant contends that the accusatory instrument fails to allege facts sufficient to establish a prima facie case to support the charge of unauthorized use of a computer. Specifically, defendant***229** argues that the factual allegations fail to identify with specificity the e-mail account allegedly accessed or any other facts to support that the alleged access was unauthorized, inasmuch as the complaint fails to state whether the e-mail account was complainant's personal work e-mail account or a "private personal" e-mail account. Moreover, defendant argues the allegations are devoid of facts to support that complainant had an expectation of privacy with regard to e-mail use at work since defendant owned the computer and complainant was defendant's employee.

The People oppose defendant's motion and contend that the factual allegations are sufficiently pleaded to support the charge. First, the People contend that the allegations that defendant was (1) observed by another employee installing keystroke-tracking software on a computer, (2) that he instructed complainant to use said computer, (3) that complainant did use said computer "for work-related purposes, including to access and use a personal email account," ****4** and (4) that defendant was later observed accessing said e-mail are sufficient to support the charge, as the allegations provide defendant with the conduct and crime that he is alleged to have committed. Second, the People contend that the question of whether the defendant, as an employer, had the authority to access the e-mail account is an issue of fact for trial, as the complainant's use of the computer for work-related purposes goes to the weight, not the sufficiency of the charges. This court disagrees with the People and finds that under the circumstances herein the factual allegations fail to establish the element of "without authorization," and as such the accusatory instrument is jurisdictionally defective.

Penal Law § 156.00 (8) defines "without authorization" to mean the use or access of "a computer, computer service or computer network without the permission of the owner . . . where such person" (1) knew that access was without permission or (2) had actual notice that he or she did not have permission from the owner of the computer or computer service, or (3) by proof that the user knowingly circumvented a security measure installed or used by the owner of the computer or computer service.

The allegations viewed in the light most favorable to the People (*see* *People v Danielson*, 9 NY3d 342, 349 [2007]; *see also* *Matter of David H.*, 69 NY2d 792, 793 [1987]), that defendant installed keystroke-tracking software and

viewed e-mail, are ***230** legally sufficient to establish that defendant knowingly used or accessed a computer. However, based on the circumstances herein, the allegations are insufficient to establish that defendant acted without authorization.

It is not contested that defendant owned the computer, as the allegations clearly state that the keystroke-tracking software was installed "on a computer at the defendant's office." The allegations further state that the complainant was "an employee at the defendant's office" and that complainant used said "computer for work-related purposes, including to access and use a personal e-mail account." However, the allegations do not allege that defendant, the computer owner, had notice of any limited access to the computer or the e-mail account. The allegations further fail to allege that complainant had installed a security device to prevent unauthorized access or use. Conversely, the allegations state that defendant sent an e-mail to complainant containing documents from her e-mail account, which supports an inference that defendant did not have notice or at minimum had a reasonable belief that his access was not prohibited or limited.

Review of the case law establishes that where a defendant, like the one herein, has some authority over the computer or computer services, to sufficiently establish the element of "without authorization" the factual allegations must clearly set forth facts to support that defendant had knowledge or actual notice that the particular access was prohibited or that defendant circumvented some security device or measure installed by the user. (*See* *People v Katakam*, 172 Misc 2d 943 [Sup Ct, NY County 1997]; *People v Esposito*, 144 Misc 2d 919 [Sup Ct, NY County 1989].) Accordingly, contrary to the People's argument, based on the unique facts before this court, the fact that defendant as the computer owner and employer had some authority over the computer and possibly the e-mail account is of import to the issue of sufficiency.

For example, in *People v Katakam* (172 Misc 2d 943 [1997]), the defendant, a computer consultant, prior to leaving his employ, made copies of company applications and programs, which he later forwarded to himself. Defendant was charged with two counts of unlawful duplication (Penal Law § 156.30), one count of criminal possession of computer-****5** related materials (Penal Law § 156.35) and two counts of computer trespass (Penal Law § 156.10). The Supreme Court, New York County, dismissed the computer trespass charge, holding that defendant,***231** as an employee, was authorized to access and use the files; as such, even though defendant had notice that the computers and files were for business use, there was no culpability for computer trespass (Penal Law § 156.10), since there was no proof that defendant used the computers without authorization.

Similarly, in *People v Esposito* (144 Misc 2d 919 [1989]), the defendant was charged under Penal Law § 156.05 for using his employee computer access to conduct non-work-related criminal history searches using the New York Police Department computer services. The court dismissed the charge of Penal Law § 156.05 as insufficient to support the indictment, since the allegations failed to establish that defendant had notice that his acts were prohibited or that the computer or computer service was password protected or in some other way prevented unauthorized use.

Whereas some may view e-mails as tantamount to a postal letter which is afforded some level of privacy, this court finds, in general, e-mails are more akin to a postcard, as they are less secure and can easily be viewed by a passerby. Moreover, e-mails are easily intercepted, since the technology of receiving an e-mail message from the sender requires travel through a network, firewall, and service provider before reaching its final destination, which may have its own network, service provider and firewall. An employee who sends an e-mail, be it personal or work-related, from a work computer sends an e-mail that will travel through an employer's central computer, which is commonly stored on the employer's server even after it is received and read. Once stored on the server, an employer can easily scan or read all stored e-mails or data. The same holds true once the e-mail reaches its destination, as it travels through the Internet via an Internet service provider. Accordingly, this process diminishes an individual's expectation of privacy in e-mail communications. (*See* *Scott v Beth Israel Med. Ctr. Inc.*, 17 Misc 3d 934 [Sup Ct,

NY County 2007] [court, in a civil matter, held that an employer's “no personal use” e-mail policy, combined with the employer's stated policy allowing for e-mail monitoring, diminished any reasonable expectation of privacy an employee may have regarding computer services]; *see also* *Smyth v Pillsbury Co.*, 914 F Supp 97, 100-101 [ED Pa 1996] [finding no expectation of privacy in e-mail communications voluntarily made by an employee over the company e-mail system].)

By the same accord, in enacting Penal Law § 156.05, the legislative intent was to criminalize computer intrusions where ***232** the owner of the computer or service had sufficiently set forth protections or policies to avoid unauthorized access. (*See* *People v Angeles*, 180 Misc 2d 146, 148-149 [Crim Ct, NY County 1999] [“The Legislature . . . put computer owners on notice that in order to receive the protection of the criminal statute, they must equip their computers with some kind of protection mechanism, such as a password requirement or a lock”], citing Mem of Atty Gen in Support of L 1986, ch 514, 1986 NY Legis Ann, at 233, and *People v Esposito* at 923.)As such, Penal Law § 156.05 was not intended to criminalize “mere use or access,” but rather to protect against knowing intrusions. (*See* *People v Angeles*, 180 Misc 2d 146, 148-149 [1999] [court dismissed Penal Law § 156.05 charge as facially insufficient, opining that in enacting Penal Law § 156.05 the legislature wanted to criminalize acts beyond mere use or access of a computer].)

The allegations herein, as in *Esposito* and *Katakam*, fail to allege facts establishing that defendant's access to the computer and e-mail exceeded his authorized access as the computer owner and employer, since the allegations are devoid of facts to support that defendant had ****6** notice of any prohibition or limitation regarding access. Furthermore, the allegations also fail to state whether the complainant gave notice to the defendant or that defendant was aware of any limited access. (*See Esposito*, *supra*.)Although the allegations state the defendant installed keystroke-tracking software and was seen accessing an e-mail account, they fail to sufficiently support the claim that defendant's access was without authorization, inasmuch as (1) defendant owned the computer and (2) the e-mail ownership is unstated. Accordingly, this court finds the allegations herein fail to support that defendant's access was unauthorized or that defendant was on notice that access was unauthorized.

The allegations also fail to set forth sufficient facts to establish that defendant circumvented a security device or password or that complainant had installed any security protections to prevent the defendant's authorization or access to the computer or e-mail account. (*See People v Goss*, NYLJ, Mar. 15, 2005, at 21, col 1 [Suffolk Dist Ct] [finding that although information alleged defendant typed in the user's screen name knowing he did not have permission, the allegations were insufficient to support the charge since they failed to allege that the computer was equipped with a safety device to avoid unauthorized access or use]; *see also* *People v Angeles*, 180 Misc 2d 146, 149 [1999]***233** [court dismissed as insufficient the count charging Penal Law § 156.05 for failing to allege facts to support, even circumstantially, that there existed a device or coding system to prevent unauthorized use].)

Therefore, for the reasons set forth, defendant's motion to dismiss the accusatory instrument as facially insufficient is granted. Given the dismissal of the accusatory instrument, defendant's remaining motions are also dismissed as moot.

NY,2010.
PEOPLE v KLAPPER

28 Misc.3d 225

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People v. Lai Lee
24 Misc.3d 1233(A), 901 N.Y.S.2d 901
N.Y.City Crim.Ct. 2009.

24 Misc.3d 1233(A)901 N.Y.S.2d 901, 2009 WL 2436670, 2009 N.Y. Slip Op. 51717(U)

The People of the State of New York
v.
Lai Lee, Defendant.
2009NY013920

Criminal Court of the City of New York, New York County

Decided on July 2, 2009

CITE TITLE AS: People v Lai Lee

ABSTRACT

Crimes
Larceny
Shoplifting

People v Lai Lee, 2009 NY Slip Op 51717(U). Crimes-Larceny-Shoplifting. (Crim Ct, NY County, July 2, 2009, Whiten, J.)

OPINION OF THE COURT

Marc J. Whiten, J.

The defendant, Lai Lee, is charged with one count of Petit Larceny (PL §155.25), along with one count of Criminal Possession of Stolen Property in the Fifth Degree (PL §165.40) and has filed a motion seeking dismissal of the complaint as facially insufficient.

In order to be facially sufficient, an information must substantially conform to the formal requirements of CPL §100.15. Additionally, the factual portion and any accompanying depositions must provide reasonable cause to believe the defendant committed the offense charged, as well as nonhearsay factual allegations of an evidentiary character which, if true, establish every element of the offense charged and defendant's commission thereof (CPL §§100.15[3] and 100.40[1]; *see* *People v Dumas*, 68 NY2d 729 [1986];*see also* *People v Alejandro*, 70 NY2d 133 [1987]). "Reasonable cause to believe that a person has committed an offense" exists when evidence or information, which appears reliable, discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it . (CPL §70.10[2])

The requirement of nonhearsay allegations has been described as a "much more demanding standard" than a showing of reasonable cause alone (*People v Alejandro*, 70 NY2d at 138, *quoting* 1968 Report of Temp Comm on Rev of Penal Law and Crim Code, Intro Comments); however, it is nevertheless a much lower threshold than the burden of proof beyond a reasonable doubt *(People v Henderson*, 92 NY2d 677, 680 [1999];***2***People v Hyde*, 302 AD2d 101, [1st Dept 2003]). Thus, "[t]he law does not require that the information contain the most precise words or phrases most clearly expressing the charge, only that the crime and the factual basis therefore be sufficiently alleged" (*People v Sylla*, 7 Misc 3d 8, 10 [2d Dept 2005]). Finally, where the factual allegations contained in an information "give an accused sufficient notice to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 390 [2000];*see also People v Konieczny*, 2 NY3d 569 [2004];*People v Jacoby*, 304 NY 33, 38-40 [1952];*People v Knapp*, 152 Misc 368, 370 [1934],*affd*242 App Div 811;*People v Allen*, 92 NY2d 378, 385 [1998];*People v Miles*, 64 NY2d 731, 732-733 [1984];*People v Shea*, 68 Misc 2d 271, 272 [1971]; *People v Scott*, 2005 NY Slip Op 25179 [Crim Ct, NY County [2005]).

In the case at bar, the factual allegations state that:

Store Detective Lauryna Petrauskiene observed the defendant inside the above named store and remove one (1) handbag, one (1) pair of tights and one (1) jacket from a rack and conceal one (1) handbag, one (1) pair of tights and one (1) jacket by placing said items inside defendant's bag and then Store Detective Lauryna Petrauskiene observed the defendant walk past more than one open register and move to another floor in the store in possession of the property and without paying for it. Thereafter, defendant was stopped and Store Detective Lauryna Petrauskiene recovered said items, valued at $944.00, from defendant's bag, property which belonged to the above named store and for which the defendant had no receipt.

Store Detective Lauryna Petrauskiene is a custodian of said property and defendant did not have permission or authority to take or possess the property.

As stated, the defendant in this matter is charged with one count of violating PL §155.25, Petit Larceny, and one count of violating PL §165.40, Criminal Possession of Stolen Property in the Fifth Degree. A person is guilty of Petit Larceny when he or she steals property. (PL §155.25). "A person steals property . . . when, with intent to deprive another of property or to appropriate the same to himself . . .,[he or she] wrongfully takes, obtains or withholds such property from an owner thereof." (PL §155.05[1]). To support the offense charged, "there must be a taking or severance of the goods from the possession of the owner" by depriving ownership or by appropriation. (*People v. Alamo, Jr.*, 34 NY2d 453, 457 [1974];*see also*, CPL §155.00[2]). A person deprives an owner of property by withholding it or causing it to be withheld permanently or for some extended period. (CPL §155.00[3]) A person appropriates property of another by exercising control over it permanently or for some extended period. (CPL §155.00[4]).

Defendant contends the complaint is facially insufficient because it fails to allege nonhearsay factual allegations, which, if true, support every element of the crimes charged. Defendant's argument is two-fold. First, defendant argues the allegations that she placed items in a bag, without a description of the type of bag fails to support the charge, inasmuch as, it fails to establish a concealment. Second, defendant argues the allegations that she moved within the store with the items fails to support that she exercised dominion and control wholly inconsistent ***3** with the continued rights of the owner, inasmuch as, the alleged facts fail to establish larcenous conduct supporting the allegation that she did not intend to pay for the items, such as her walking towards the exit or other conduct inconsistent with the continued rights of the owner.

In support of her contention, the defendant relies upon two post-trial decisions, *People v Parrett*, (90 Misc 2d 541 [Dist Ct Nassau Co 1977]) and *People v. Olivio*, 52 NY2d 309 [1981]. In *Parrett*, the defendant was stopped at the top of an escalator after allegedly being observed placing two items in her handbag on the main floor of the store. The court held that until a defendant left the premises there was no proof that the defendant committed larceny, since there was no proof that defendant intended to deprive the owner of the property. (*Id* at 543). Accordingly, defendant argues that since she did not leave the premises the complaint fails to support that she intended to deprive the owner of the property.

In *People v. Olivio*, 52 NY2d 309, the Court of Appeals held that a person caught with goods while still inside a store may be convicted of larceny for shoplifting where it is established that he or she exercised dominion and control wholly inconsistent with the rights of the owner, and other elements of the crime are present. (*Id* at 319). The *Olivio* court set forth factors that would support a finding that a defendant exercised dominion and control inconsistent with the rights of the owner. These factors include (1) whether the defendant conceals the merchandise in a way deemed an exercise of dominion and control inconsistent with the owner's continued rights, (2) whether there is evidence of larcenous behavior, (3) the proximity to or movement towards one of the exits, (4) possession of secreted goods a few steps from the door or moving in that direction, and (5) possession of a known shoplifting device actually used to conceal merchandise, such as specially designed outer garment or a false bottom carrying case.

It is a sad commentary on our merchandising structure that some large store owners deem it necessary to sequester patrons by floor, requiring that transactions be completed on one floor before traveling to a second floor. These retailers seem oblivious to the clear inconvenience occasioned by causing visits to multiple checkout lines on multiple floors of an establishment where desired accessorizing apparel are distributed throughout the many floors of the store.

This hyper security, which complicates intra-store commerce also presents challenges to the store owner's related claims in a charged crime such as Petit Larceny. The question of when a “taking” has occurred is a primary consideration in evaluating the facial sufficiency of claims supported by non-specific behavior.

The German novelist, poet and scientist, Johann Wolfgang von Goethe (1749-1832) wrote “Behavior is a mirror in which every one displays his image”. The image or behavior of a defendant who does not attempt to leave store premises or conceal merchandise in a manner which exercises dominion and control to the exclusion of the owner creates in the first instance, an unacceptable ambiguity when only non-specific behavior is alleged, which does not on it's face rise to the level of a “taking”.

If such behavior does not on it's face rise to the level of a “taking” then a defendants insufficiency argument must be seriously considered.

Applying the *Olivio* factors to the present case, the court finds the allegations fail to provide sufficient facts to support that the defendant exercised dominion and control inconsistent with the owner's continued rights by placing the merchandise in a bag. Other than the accusation ***4** that the defendant placed items in a bag, the allegations fail to provide some other conduct to support the claim that defendant's actions were consistent with that of a shoplifter. (*See, Olivio* at 319). As stated in *Olivio*, a shoplifter, unlike customers with implied consent to possess merchandise while shopping, treats merchandise in a manner inconsistent with the implied rights granted to consumers, so much so that the unusual behavior by the defendant would allow the trier of facts to find a taking. (*Olivio* at 318, *see generally, People v. Day*, 280 AD 253, 254 [3rd Dept. 1952]; [Stating that a “self-serve store invites the customer both to come on the premises and to take physical possession of merchandise...”]). Although, the items were placed in a “bag” dominion and control is not established since the placement of the merchandise in a bag is not by

definition “concealment” . The allegations fail to allege facts, such as the description of the bag or that the security tags were removed, that support the items were concealed or detached from the owner. (See, *People v. Alamo, supra*, at 457-458); [Stating that mere movement of an item merely tends to support the idea of control and “not necessarily the actions needed to gain possession and control...”])

Given the environmental or Earth movement, as well as the sale by various stores of “earth bags” or “recyclable bags” the placement of items in a bag is becoming common place to the average shopper. Therefore, the placement of an item in “a bag” without more, fails to support a concealment or detachment.

Proof of larcenous behavior and intent can be supported with additional conduct, such as the removal of garment security devices (*see, People v. Rembert*, 149 Misc 2d 16, 17-18 citing *People v. Harrison*, 50 NY 518, 523 [1872], [Possession remains with the owner where there remains some physical connection to the property]), or whether the bag was of a type typically used to conceal merchandise, such as a false bottom carrying case or a “booster” bag. (*see, People v. Banister*, 13 Misc 3d 764, 765 [Crim. Ct. NY Co. 2006]; [Identified a “Booster bag” as an altered shopping bag lined with gray electrical tape utilized to steal merchandise to which security devices are affixed in that the electrical tape prevents store theft detectors from sensing security devices inside the bag.]).

Accordingly, the allegations fail to establish conduct inconsistent with a customer's implied rights while shopping. There is no claim of an abridgement of the shopper's right to free movement asserted here. The allegations do not assert there existed signage preventing customers from moving items from one floor to another floor or decreeing that items must be purchased on the level where displayed. Furthermore, unlike the defendants in *Olivio*, who were in proximity to or moving toward the exits, Ms. Lee is alleged to have been moving toward a second floor escalator when she was apprehended. The court takes judicial notice that unless a notice to the contrary is posted, the alleged behavior of moving items within a department store is common, inasmuch as, department store customers commonly wait until all shopping or browsing is complete to make a final purchase. For the reasons set forth, defendant's motion to dismiss the accusatory instrument as facially insufficient is granted.

This constitutes the decision and order of the court.

Dated: July 2, 2009_____***5**

New York, New YorkMarc J. Whiten, JCC

N.Y.City Crim.Ct. 2009.
People v Lai Lee

24 Misc.3d 1233(A)

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People v. Paes
17 Misc.3d 1120(A), 851 N.Y.S.2d 65
N.Y.City Crim.Ct. 2007.

17 Misc.3d 1120(A)851 N.Y.S.2d 65, 2007 WL 3146568, 2007 N.Y. Slip Op. 52091(U)

People of the State of New York
v.
Raymond Paes, Defendant.
2007NY026399

Criminal Court of the City of New York, New York County

Decided on October 26, 2007

CITE TITLE AS: People v Paes

ABSTRACT

Crimes
Harassment

Crimes
Stalking

People v Paes (Raymond), 2007 NY Slip Op 52091(U). Crimes-Harassment. Crimes-Stalking. (Crim Ct, NY County, Oct. 26, 2007, Whiten, J.)

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OPINION OF THE COURT

Marc J. Whiten, J.
The defendant, Raymond Paes, is charged with a violation of Penal Law §240.30(1)(a)(Aggravated Harassment in the Second Degree), Penal Law §240.25(Harassment in the First Degree), Penal Law §§120.45(1) and 120.45(2) (Stalking in the Fourth Degree), and Penal Law §120.50(3)(Stalking in the Third Degree).

Defendant is charged with three counts of the first offense and a single count of the remainder of the offenses.

The defendant has moved by omnibus motion for the following: (1) Dismissal for Facial Insufficiency of the charges; (2) Mapp/Dunawayhearing and Preclusion of any statement or identification of defendant; (3) *Sandoval* Hearing; (4) Bill of Particulars; (5)Discovery; and (6) Brady material.

The Court has reviewed the Defendant's motion papers, the People's response and all relevant statutes and case law, and, for the reasons discussed hereafter, decides the Defendant's motion as follows:

DISMISSAL FOR FACIAL INSUFFICIENCY

The accusatory instrument, in pertinent part, charges defendant with the commission of the aforementioned crimes on ***2** January 11, 2007, at about 8:00 hours at 306 West 54th Street in the County of New York, State of New York under the following circumstances:

Deponent states that deponent is informed by [the complainant] that he received two letters from the defendant on January 11, 2007, and February 1, 2007, at his place of employment at the above location. Deponent is further informed that on February 4, 2007 informant went to defendant's home and advised the defendant not to contact informant anymore [and] on February 5, 2007 informant received a third letter from defendant.

Deponent is further informed that all said letters contained written statements from defendant to wit: (i) Blame Madonna's Devil 4:48 Second Evening of February...and not 6:20 Hitler's 7:13 Buddies 7:01 for Satan's heel prints on Joe (written above a photocopy of Isiah Thomas that is titled HIS FAULT), (ii)10th evening of 2007 7:47 because in talk 8:18 Satan keeps bring up detective Joseph Monahan of of the midtown precinct (who had taken a sincere liking of sweet old Jesus) lucky me winner Madonna is going to mail stupid buddy this page plus seventeen pages beginning with “Joe's next” and page 0128th morning...the immaculate defendant (9:23 afternoon negative is a sponge bather 4:47 10th evening as of yesterday the mini-sized bathroom in the third floor hall, and (iii)17th evening of November 2000, last December when I your god damn it confident Jesus preacher Raymond Paes squealer America read Beechers's note your devil told me an angry righteous injured man.

Deponent is further informed that defendant included [in the mail] a nude photo of the defendant with the words “JOE'S NEXT” written above said nude photo of the defendant, a photo of defendant's infected foot, store receipt, lists of apartment repairs and copies of the defendant's civil lawsuit letters.

An information is facially sufficient if it contains nonhearsay factual allegations of an evidentiary character which establish, if true, every element of the offense charged and defendant's commission thereof (CPL §§100.15[3] and 100.40[1]); See People v. Dumas, 68 NY2d 729 (1986); See also People v. Alejandro, 70 NY2d 133 (1987). Where the factual allegations contained in an information “give an accused sufficient notice to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading”. See People v. Casey, 95 NY2d 354, 390 (2000); See also ***3**People v. Konieczny, 2 NY3d 569 (2004).

Aggravated Harassment in the Second Degree [PL §240.30(1)(a)]“A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he: 1. Communicates, or causes a communication to be initiated by mechanical or electronic means or otherwise, by telephone, or by telegraph, mail or any other form of written communication, in a manner likely to cause annoyance or alarm.” [PL §240.30(1)(a)].

The defendant is charged with the violation of the statute because he sent three pieces of mail to complainant. In addition to having "annoying" written contents, the mail further contained a nude picture of the defendant.

There is no question that defendant sent complainant several unwanted communications via mail. A prosecution under Penal Law §240.30(1)(a) rests upon the idea that such a violation creates an intolerable invasion of privacy. See, People v. shack, 86 NY2d 529 (1995). In effect, the purpose of the "aggravated harassment" statute was to "protect privacy interests." See, People v. Amalfi, 141 Misc 2d 940(1988); see, also People v. McDermott, 160 Misc 2d 769 (1994).

The described conduct rises to the level of "annoyance" at the very least. The supporting deposition sets forth that defendant, after being notified about ceasing the communication via mail, continued to send correspondence with the same contents as his previous mail. These are facts which, if true, demonstrate that defendant sent the mail with no legitimate purpose of communication. See, People v. Shack, 86 NY2d 529 (1995); see, also People v. Miguez, 153 Misc 2d 442 [App Term, 1st Dept 1992].

A major issue here revolves around the intent element of the charge. Defendant here raises the lack of intent of the defendant to harass complainant. The accusatory portion of the complaint charges that the communication was made with the intent to harass, annoy, threaten and alarm another with no purpose or legitimate communication.

Here, the defendant's three US mail based communications constitute invasions of complainant's privacy, because the content of the three alleged communications evince an intention to harass, annoy, threaten or alarm the complainant.

On one occasion, the complaint alleges, complainant went to confront defendant, specifically demanding that the defendant's conduct against the complainant cease. Nonetheless, defendant sent another missive with the same contents, disregarding complainant's express wishes.

The intent necessary to sustain a charge under subdivision (1) ***4** can be inferred from factual circumstances alleged in the accusatory instrument. See, People v. Miguez, supra ;People v. McGee, 204 AD2d 53 [2d Dept 1994]; People v. Bracey, 41 NY2d 296 (1977). The complaint alleges that defendant sent unwanted communications and continued to do so even after he was ordered by the complainant to cease. Defendant specifically targeted complainant by naming him in writing and addressing the mail to his place of employment.

With the element of "intent" clearly established in the complaint, the three counts of aggravated harassment in the second degree are facially sufficient.

Protected Speech

The Court is compelled to consider the constitutional issues related to the instant communications.

It is well established that communication which may properly be prohibited by the First Amendment includes, among other things, communication which are obscene. See, People v. Smith, 89 Misc 2d 789 (1977); see, also People v. Mishkin, 26 Misc 2d 152 (1960); see, also People v. Steinberg, 60 Misc 2d 1041 (1969).

Penal Law §235.00 clearly defines that "any material or performance is " obscene" if (a) the average person,

applying contemporary community standards, would find that considered as a whole, its predominant appeal is the prurient interest in sex, and (b) it depicts or describes (...) Lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious...artistic value."

Here, defendant included a nude photograph of himself with the words "Joe's next" superimposed thereon. Within the text of defendant's letter, he identifies complainant as Detective Joseph Monahan. Therefore, defendant clearly directed his communications to complainant by mailing them to his attention and by naming Detective Joseph Monahan [complainant]. Such intentional conduct allows no alternative conclusion, but that the complainant was the target of clearly disturbing and alarming content.

Such conduct is not protected by the free speech clause of the Constitution and is punishable. See, People v. Mangano, 100 NY2d 569(2003).

PL 240.30(1) requires only that the person charged acted with intent to harass, annoy, threaten or alarm when he made communications in a manner likely to cause annoyance or alarm. In the case at bar, defendant's intention to harass is correctly pleaded. See, People v. Sassower, NYLJ, November 6, 1998, at 23, col 3.

Accordingly, the Court denies the motion to dismiss the above counts on the grounds of facial insufficiency.

Harassment in the First Degree(PL §240.25)***5**

As for the violation of Penal Law §240.25(Harassment in the First Degree), no challenge was made to that charge. The Court, therefore, declines to review it.

Stalking in the Fourth Degree [PL §§ 120.45(1), 120.45(2)] and

Stalking in the Third Degree [PL §120.50(3)As to the counts pertaining to the violation of the above statutes, defendant here challenges the facial sufficiency of the accusatory instrument. Defendant alleges that there was no showing of intent to cause alarm on the part of the defendant and, under the Stalking Statute, defendant's conduct did not cause fear of material harm to the complainant.

A person is guilty of stalking in the third degree when he or she:(...)with intent to harass, annoy, or alarm a specific person, intentionally engages in a course of conduct directed at such person which is likely to cause such person to reasonably fear physical injury or serious physical injury, the commission of a sex offense against, or the kidnaping, unlawful imprisonment or death of such person or a member of such person's immediate family [PL §120.50(3)].

A person is guilty of stalking in fourth degree when he or she intentionally and for no legitimate purpose, engages in a course of conduct directed at a specific person, and knows or reasonably should know that such conduct:

1. Is likely to cause reasonable fear of material harm to the physical health, safety or property of such person, a member of such person's immediate family or a third party with whom such person is acquainted; or

2. Causes material harm to the mental or emotional health of such person, where such conduct consists of following, telephoning or initiating communication or contact..., and the actor was previously clearly informed to cease that conduct.

In the instant case defendant is not alleged to have made an explicit threat. Stalking in the fourth degree does not require an allegation of a threat of immediate and real danger. See, People v. Wong, 3 Misc 3d 274 (2004). All that is required is that the offender must have intended to engage in a course of conduct targeted at a specific individual. See, People v. Stuart, 100 NY2d 412 (2003). Here, the Court has already concluded that defendant, by his conduct of repeated and unwanted communication in the nature as outlined in the complaint, has met the requisite standard to establish general intent.

The remaining question relative to the Stalking in the Fourth Degree charge is whether defendant, by his actions, intended to ***6** place complainant in reasonable fear of physical injury or caused complainant emotional distress. Since "reasonable fear" was made an element of the crimes charged, it becomes a prerequisite to find "fear" in order to sustain the above charges. Under PL §120.45(1) and (2), liability arises from a series of acts that instill fear of harm in the complainant, irrespective of the content of the communication. Also under PL § 120.50(3) defendant's conduct must be likely to reasonably cause complainant to fear physical injury, or the commission of a sex offense against [him].

U.S. Supreme Court Justice Potter Stewart wrote in his decision FN1 regarding pornography or obscenity that "[he] shall not today attempt further to define the kinds of material [he] understand[s] to be embraced . . . [b]ut [he] knows it when [he] see[s] it . . . " In the instant matter, the transmittal of defendant's nude image together with the superimposed message "Joe's next" [knowing complainant is named Joseph] would, to any reasonable person, suffice to convey a "threat" to physical health and safety. While the communication may not represent an overt and clearly stated threat, it is clear to this court that the inference is sufficient to convey the threat.

Following the objective standard of evaluation of "reasonable fear or belief" as outlined by the Court of Appeals in Goetz FN2, the court ascertains that a reasonable person under the facts and circumstances here could be put in fear of physical injury or material harm to his or her mental and, or emotional health. The information as it stands supports the complaint of stalking in the Fourth and Third degrees.

Accordingly, the defendant's motion to dismiss the information based on the charge of stalking in the fourth and third degrees, respectively pursuant to PL §§120.45(1), 120.45(2) and PL §120.50(3) is denied.

PRECLUSION

The defendant asks the court to preclude any statement or identification testimony for which proper notice has not been given.

The People are required to give advance notice to the defendant of their intention to introduce at trial any potentially suppressible statements made by the defendant to a public servant (CPL §710.30[1]). Such notice must be served within fifteen days ***7** after arraignment and before trial (CPL § 710.30[2]). A failure to give the required notice before trial mandates exclusion of the statement. See People v Briggs, 38 NY2d 319(1975).

In the present case, the people served notice of their intention to use defendant's statement on May 3, 2007, the date of the arraignment. This notice clearly satisfies the requirement of Criminal Procedure Law § 710.30.

Therefore, defendant's motion to preclude statement and identification testimony is denied. Further motions may be renewed in the event the People attempt to offer unnoticed statement or identification testimony.

MAPP/DUNAWAY HEARING/SUPPRESSION

Defendant's motion requesting a Mapp/Dunaway hearing is denied.

SANDOVAL/MOLINEUX

Defendant's motion to preclude the use of defendant's criminal history or uncharged bad acts is referred to the trial court.

BILL OF PARTICULARS AND DISCOVERY

Defendant's motion for a Bill of Particulars (5) and additional discovery (6) is granted as indicated in the people's response and the Voluntary Disclosure Form.

The people's reciprocal discovery is also granted.

The People are reminded of their continuing obligation to supply *Brady* material.

This opinion constitutes the decision and order of the Court.

Dated:October 26, 2007_____

New York, NYMARC J. WHITEN, JCC

FOOTNOTES

FN1. See, Jacobellis v. Ohio, 378 U.S. 184 (1964)

FN2. See, People v. Goetz, 68 NY2d 96 (1986)

N.Y.City Crim.Ct. 2007.
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People v. Pidhajecky
20 Misc.3d 1119(A), 867 N.Y.S.2d 19
N.Y.City Crim.Ct. 2008.

20 Misc.3d 1119(A)867 N.Y.S.2d 19, 2008 WL 2746722, 2008 N.Y. Slip Op. 51401(U)

The People of the State of New York
v.
Evans Pidhajecky, a/k/a Evan Claude, Defendant.
2007NY092014

Criminal Court of the City of New York, New York County

Decided on July 16, 2008

CITE TITLE AS: People v Pidhajecky

ABSTRACT

Crimes
Stalking
Celebrity Stalking

People v Pidhajecky (Evans), 2008 NY Slip Op 51401(U). Crimes-Stalking-Celebrity Stalking. Penal Law-§ 120.45 (1) (Stalking, fourth degree). (Crim Ct, NY County, July 16, 2008, Whiten, J.)

OPINION OF THE COURT

Marc J. Whiten, J.
One of the hallmarks of contemporary American culture is a heightened focus on the private lives of individuals who have achieved notoriety within their professions, particularly within the entertainment industry. While this most often manifests itself in harmless, if sometimes annoying or inconvenient, interactions between the fans and the famous, there are instances when prohibited, dangerous and even lethal conduct takes place; the observation of French Renaissance essayist Michel de Montaigne (1533-1592) unfortunately holds true today "Fame and tranquility can never be bedfellows." This court is now called upon to decide the parameters of what constitutes stalking in the fourth degree as it pertains to conduct alleged to have been directed at the Emmy-winning television producer, writer and comedian Lorne Michaels.

The defendant, Evans Pidhajecky, stands charged by information with one count of stalking in the fourth degree (PL § 120.45 [1]), and one count of resisting arrest (PL § 205.30). He now files a motion seeking dismissal for facial insufficiency, along with various other relief. For the following reasons, defendant's motion to dismiss is denied.

In order to be facially sufficient, an information must substantially conform to the formal requirements of CPL 100.15. Additionally, the factual portion and any accompanying depositions must provide reasonable cause to believe the defendant committed the offense charged, as well as nonhearsay factual allegations of an evidentiary character which, if true, establish every element of the offense charged and defendant's commission thereof (CPL 100.15[3] and 100.40[1]; *see People v. Dumas*, 68 NY2d 729 [1986];*see also People v Alejandro*, 70 NY2d 133 [1987]).

The requirement of nonhearsay allegations has been described as a "much more demanding standard" than a showing of reasonable cause alone (*People v Alejandro*, 70 NY2d at 138, *quoting* 1968 Report of Temp Comm on Rev of Penal Law and Crim Code, Intro Comments); however, it is nevertheless a much lower threshold than the burden of proof, beyond a reasonable doubt ***2***(People v Henderson*, 92 NY2d 677, 680 [1999];*People v Hyde*, 302 AD2d 101 [1st Dept 2003]). Thus, "[t]he law does not require that the information contain the most precise words or phrases most clearly expressing the charge, only that the crime and the factual basis therefor be sufficiently alleged" (*People v Sylla*, 7 Misc 3d 8, 10 [2d Dept 2005]). Finally, where the factual allegations contained in an information "give an accused sufficient notice to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 390 [2000];*see also People v Konieczny*, 2 NY3d 569 [2004];*People v Jacoby*, 304 NY 33, 38-40 [1952];*People v Knapp*, 152 Misc 368, 370 [1934],*affd*242 App Div 811;*People v Allen*, 92 NY2d 378, 385 [1998];*People v Miles*, 64 NY2d 731, 732-733 [1984];*People v Shea*, 68 Misc 2d 271, 272 [1971]; *People v Scott*, 2005 NY Slip Op 25179 [Crim Ct NY County [2005]).

In this case, defendant was arrested after allegedly having contacted the complainant via telephone, letters sent through the mail, a hand-delivered written note, and personal appearances at the complainant's residence. The information sets forth allegations concerning six separate acts by defendant, occurring over ten months' time, which included defendant's assertions that "Mr. Michaels' television program, Saturday Night Live had overheard' defendant's private conversations, singing and/or other utterances' and used them on said program without defendant's consent," and that "certain writing on said program reflected defendant's personal thoughts', tastes' and sense of humor' without permission," and that "this made the defendant very upset' ". Further, the information alleges that when police officers attempted to arrest defendant for the alleged stalking, defendant "flailed his arms, refused to place his hands behind his back, and pushed one officer away when the officer attempted to handcuff the defendant.

As to the stalking charge, Penal Law §120.45 (1) provides that a person is guilty of stalking in the fourth degree when he or she intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person, and knows or reasonably should know that such conduct is likely to cause reasonable fear of material harm to the physical health, safety or property of such person, a member of such person's immediate family or a third party with whom such person is acquainted. As to the charge of resisting arrest, Penal Law § 205.30 states that a person resists arrest by intentionally preventing or attempting to prevent a police officer from effecting an authorized arrest.

Defendant argues that the accusatory instrument is facially insufficient because it fails to set forth factual allegations to establish each element of the offense. Specifically, defendant argues that the allegations fail to show that defendant engaged in a "course of conduct"; that he acted with the requisite intent and with no legitimate purpose; and that the defendant's actions caused or were likely to cause reasonable fear of material harm. In regard to the second charge, defendant argues that the arrest was not authorized, and, as well, that defendant did not know that the plainclothes officers who were arresting him were in fact, police officers, and that he therefore could not have intended to resist arrest by an officer.

Defendant's arguments as to the stalking charge are unpersuasive. The anti-stalking statute was enacted in 1999, at which time the Legislature noted that "criminal ***3** stalking behavior...has become more prevalent in New York state in recent years. The unfortunate reality is that stalking victims have been intolerably forced to live in fear of their stalkers...who repeatedly follow, phone, write, confront, threaten or otherwise unacceptably intrude upon their victims, often inflict immeasurable emotional and physical harm upon them. Current law does not adequately recognize the damage to public order and individual safety caused by these offenders" (Donnino, 2004 Main Volume Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law, Art 120, at 182-183). While the correlation between stalking and intimate relationships was foremost on the Legislature's agenda (*id*., 183), there is

no reason to exclude or minimize the impact of stalking that occurs between total strangers, as is most often the case when the target is a celebrity.

Although the vast majority of stalking victims are private citizens who knew their stalkers (Brody, *Researchers Unravel the Motives of Stalkers,* New York Times, August 25, 1998, sec F, p 1, col 1), celebrity stalking is increasingly common. Recently in this courthouse, a defendant was found guilty of stalking movie star Uma Thurman over a period of two years; other celebrities who have been stalked, most often by professed fans, include television personality David Letterman, fashion model and television personality Tyra Banks, soccer star David Beckham, singers Madonna and Janet Jackson, actress Jodi Foster, and, perhaps most famously as well as most tragically, musician John Lennon. It is against this backdrop that defendant's conduct must be weighed.

As to the elements of the alleged offense, it is first clear that the allegations establish that defendant engaged in a course of conduct. It is alleged that on March 5, 2007, he left a voice mail message for the complainant at complainant's workplace; on March 15, 2007, he sent a letter to complainant at complainant's workplace; on December 6, 2007, he sent a letter to complainant's home; on December 7, 2007, he appeared in person at defendant's home, not once, but twice, attempting to speak with or see the complainant; and on the second of these two visits, he left a handwritten note for the complainant with the doorman at the building where complainant resides, expressing a desire to "chat." While the statute is silent as to what precisely constitutes a course of conduct, it is nevertheless clear that sustained and escalating conduct, as defendant is alleged to have engaged in here, is significantly more than an "isolated incident" which would fail to show a course of conduct (*see* *People v Valerio*, 60 NY2d 669 [1983]).

In relation to factually similar menacing charges, several trial courts have found that "the term course of conduct' may reasonably be interpreted to mean a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a *continuity of purpose*" (*People v Payton*, 161 Misc 2d 170, 174 [Crim Ct NY County, 1994]) (emphasis added)(relying on *People v Tralli*, 88 Misc 2d 117 [App Term, 2d Dept 1976]) (see also *People v Murray*, 167 Misc 2d 857 [Crim Ct NY County, 1995]; *People v Monroe*, 183 Misc 2d 374 [Crim Ct NY County, 2000]). The allegations here clearly show defendant's continuity of purpose; his behavior throughout was governed by his intention to make contact with Mr. Michaels in order to discuss the problems defendant perceived regarding defendant's private thoughts being used without permission. Defendant had no other purpose, and it was continued throughout his attempts to make ***4** contact.

Defendant's reliance on *People v Stuart* (100 NY2d 412 [2003]) is misplaced, inasmuch as by confirming a stalking conviction based on evidence which showed daily contact, the Court of Appeals did not raise the bar above and beyond the requirements of the statute. The offense of stalking in the fourth degree requires two mental states. A person is guilty of stalking if they *intentionally* engage in a course of conduct; and they *know or reasonably should know* that their conduct will create reasonable fear of material harm to the person they are targeting. Thus, it is irrelevant that, as defendant asserts, he did not intend to violate the statute; rather, what is relevant is it is alleged that he intentionally engaged in the behaviors which displayed his continuity of purpose in seeking contact with Lorne Michaels. As the court held in *People v Stuart* (100 NY2d 412 [2003]), the statute "focuses on *what the offenders do, not what they mean by it* or what they intend as their ultimate goal. [ ] If the legislature had required that the stalker intend to frighten or harm the victim, the statute would be debilitated and a great many victims endangered" (*id.*, 427) (emphasis added).

The statute further requires that a person engaged in stalking have no legitimate purpose for their conduct. Defendant relies on *People v Shack* (86 NY2d 529 [1995]) for the proposition that a showing of no legitimate purpose is made only when the communication lacks ideas other than threats, intimidation or coercion; however, this principle is inapplicable to stalking cases, because *Shack* dealt only with a charge of aggravated harassment (PL §

240.30 [2]), not stalking. While the court in *People v Stuart* (100 NY2d 412 [2003]) did state that "the phrase no legitimate purpose' means the absence of a reason or justification to engage someone, other than to hound, frighten, intimidate or threaten," (*id*., 428), the court went on to state that "[t]he common understanding of that phrase and the various other provisions of the anti-stalking statute, when read as a whole" put defendant on notice that his pursuit of the complainant was unlawful. Here, in giving the phrase "no legitimate purpose" its ordinary meaning, while considering it within the context of the of the statute as a whole, this court finds that defendant's purpose was not legitimate; indeed, defendant's purpose discussing, with Lorne Michaels, the use of defendant's personal thoughts without his permission was a factor creating a likelihood of reasonable fear on the part of the complainant.

Actual fear, whether reasonable or not, is not a required element of the offense; the facts need only show that a defendant knows or should reasonably know that his actions are *likely* to cause reasonable fear (PL § 120.45 [1]) (emphasis added). In this case, the factual allegations do assert that the complainant was in reasonable fear, and this court finds that the defendant should have reasonably known that his actions were likely to cause such a result. The defendant is neither acquaintance nor colleague to the complainant; and the objectives allegedly stated in defendant's communications would tend to indicate an interest in the complainant that was well on its way to becoming the kind of obsession that can only lead to more problems and possible danger. In the most extreme cases, individuals who engage in such obsessive behavior " exhibit a broad range of behaviors, motivations and psychological traits " (Brody, *Researchers Unravel the Motives of Stalkers,* New York Times, August 25, 1998, sec ***5** F, p 1, col 1) and are often motivated by mental illness or personality disorders that are recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), such as depression, schizophrenia, narcissism or erotomania. In short, if the allegations set forth in the complaint are true, Lorne Michaels had ample reason to be in fear. Additionally, a person who engages in the behavior alleged in this case knows or should know that such behavior is likely to create reasonable fear in the person against whom such behavior is directed. The likelihood of creating reasonable fear is neither diminished nor amplified by the fact that the complainant is a celebrity, and this finding does not offer any special protection to the complainant due to his notoriety; to the contrary, a likelihood of reasonable fear arises whenever one person blames another for unsanctioned use of private thoughts, and repeatedly attempts to communicate regarding this topic.

The allegations also set forth a facially sufficient charge of resisting arrest. First, defendant's alleged conduct established the requisite probable cause for the arrest of the defendant. As set forth above, the defendant's conduct, if true, encompassed every element of the offense of stalking, and the police officers who effectuated the arrest had reason to believe that a crime had been committed. Defendant's contention that the officers did not identify themselves, contrary to an explicit allegation in the complaint that the officers did identify themselves, is an issue for trial. Furthermore, defendant's attempted reliance upon *People v Saitta* (79 AD2d 994 [2d Dept 1981]) is misplaced, inasmuch as the testimony at trial in *Saitta* included the arresting officer's concession that he did not properly inform the defendant, therefore creating a basis for overturning defendant's conviction for resisting arrest. In this case, at this stage in the proceeding, there is no such concession by the police.

Clearly, the factual allegations, if taken as true, sufficiently set forth the charges of stalking and resisting arrest. In conclusion, the court finds that the presently challenged charges are facially sufficient, inasmuch as defendant has notice sufficient to prepare a defense and the charges are adequately detailed to prevent defendant from being tried twice for the same offense (*see**People v Casey*, 95 NY2d 354 [2000]).

Regarding defendant's remaining applications, a Huntley/Dunaway hearing is ordered, and issues pertaining to *Sandoval* and *Molineux* are deferred to the trial court.

This constitutes the decision and order of the Court.

Dated:July 16, 2008

New York, New York

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Marc J. Whiten, JCC

N.Y.City Crim.Ct. 2008.
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20 Misc.3d 1119(A)

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24 Misc.3d 1221(A), 899 N.Y.S.2d 62
N.Y.City Crim.Ct. 2009.

24 Misc.3d 1221(A)899 N.Y.S.2d 62, 2009 WL 2138928, 2009 N.Y. Slip Op. 51538(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

The People of the State of New York
v.
Nasrollah Solyhanzadeh, Defendant.
2009NY017646

Criminal Court of the City of New York, New York County

Decided on July 8, 2009

CITE TITLE AS: People v Solyhanzadeh

ABSTRACT

Crimes
Forgery
Bent MetroCard

People v Solyhanzadeh (Nasrollah), 2009 NY Slip Op 51538(U). Crimes-Forgery-Bent MetroCard. (Crim Ct, NY County, July 8, 2009, Whiten, J.)

APPEARANCES OF COUNSEL

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OPINION OF THE COURT

Marc J. Whiten, J.

The defendant, Nasrollah Solyhanzadeh, is charged with criminal possession of a forged instrument in the third degree in violation of Penal Law ("PL") §170.20. The defendant in an omnibus motion seeks: (1) Dismissal of the accusatory instrument as facially insufficient, pursuant to CPL §§ 170.30 [1] [a] and 170.35[1]; (2) Suppression of physical evidence or a Mapp/Dunaway hearing; (3) Preclusion of identification evidence and statements for which proper notice was not given by the People; (4) Preclusion of evidence of defendant's prior convictions pursuant to *People v. Sandoval*; (5) discovery; and (6) a bill of particulars. Upon the foregoing, the defendant's motion is decided as follows.

Defendant's facial insufficiency argument is without merit. An information is facially sufficient if it meets three requirements. First, it must substantially conform to the formal requirements of CPL §100.15. Additionally, the factual portion and any accompanying depositions must provide reasonable cause to believe the defendant committed the offense charged, as well as nonhearsay factual allegations of an evidentiary character which, if true, establish every element of the offense charged and defendant's commission thereof (CPL §§ 100.15[3] and 100.40[1]; *see People v Dumas*, 68 NY2d 729 [1986];*see also People v Alejandro*, 70 NY2d 133 [1987]). "The law does not require that the information contain the most precise words or phrases most clearly expressing the charge, only that the crime and the factual basis therefore be sufficiently alleged." (*People v Sylla*, 7 Misc 3d 8, 10 [App Term, 2d ***2** Dept 2005]). Additionally, where the factual allegations contained in an information "give an accused sufficient notice to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading." (*People v Casey*, 95 NY2d 354, 390 [2000]).

"A person is guilty of criminal possession of a forged instrument in the third degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses a forged instrument." (P.L. § 170.20). Accordingly, to support the charge the accusatory instrument must establish that the instrument at issue was forged, that the defendant possessed the instrument, that he or she possessed it knowing that it was forged, and that he or she used it or possessed it with the intent to deceive, defraud or injure another. (*See, People v. Johnson*, 65 NY2d 556 [1985];*People v. Singh*, N.Y.L.J., May 11, 1999, p.28, col. 1 [Crim. Ct., NY Co.]).

In the case at bar, the information sets forth factual allegations stating, in sum, that deponent recovered three bent MetroCards from the defendant, and that the MetroCards were bent along the magnetic strip in a manner that obliterates the encoded data and alters the value of the MetroCard. Defendant argues that these factual allegations are facially insufficient, inasmuch as they fail to set forth facts and non-hearsay allegations establishing the offense charged.

Defendant's argument is three-fold. First, defendant argues the charge should be dismissed because the legislature's enactment of P.L. §165.16 precludes prosecution for possession of forged MetroCards under the general forgery statutes. Second, defendant argues that a bent Metrocard is not a forged instrument because it does not purport to be an authentic creation issued by the Transit Authority. Third, defendant argues that the accusatory instrument fails to establish that the defendant had knowledge that the instrument was forged or that the defendant had the requisite intent to defraud. The court disagrees and denies defendant's facial sufficiency motion.

Defendant's first argument is unavailing. Defendant does not allege nor has the court found anything in the language or legislative history of Penal Law §165.16 suggesting the legislature, in the enactment of PL §165.16, intended to foreclosure or limit prosecution of possession of forged MetroCards. (*See, People v. Mattocks*, 2009 WL 1148646 *1, *4]). Furthermore, the applicability of forgery statutes has been upheld by the New York Court of Appeals in *People v. Mattocks, 2009 WL 1148646 *3* [2009], in which the court held that PL §165.16 did not eliminate the applicability of forgery statutes for MetroCard prosecution. In addition, as a general rule, when conduct is potentially punishable under two or more statutes, the prosecution has prosecutorial discretion to choose among the statutes when initiating a prosecution. (*People v. Valenza*, 60 NY2d 363, 370 [1983]). It is also well settled that absent explicit legislative language, an overlap in criminal statutes and/or the opportunity for prosecutorial choice does not bar prosecution. (*People v. Eboli*, 34 NY2d 281, 287 [1974];*see also People v. Duffy*, 79 NY2d 611, 615 [1992][In the absence of a clear legislative intent barring prosecution, a defendant may be convicted under any applicable statute]). Therefore, the court finds defendant's prosecution under PL §170.20 is not precluded by the enactment of PL §165.16.

Defendant's second argument that a bent MetroCard is not a forged instrument within the purview of Penal Law § 170.00 is also unpersuasive. Contrary to defendant's contention MetroCards do constitute forged "instruments" within the purview of ***3**Penal Law § 170.00. (*See, People v. Mattocks, 2009 WL 1148646 *3;*[Concluding that MetroCards with creases or bends constituted forge instruments within the purview article 170*]; see also, People v. Verastegui*, 8 Misc 3d 1026(A) [NYC Crim.Ct., NY Cty 2005], *People v. Roman*, 8 Misc 3d 1026(A) [Crim.Court, NY Cty 2005], *People v. Owens*, 12 Misc 3d 600 [Supreme Court, Bx Cty 2006], *People v. Gottlieb*, 36 NY2d 629 [1975]). A "forged instrument" is defined as a "written instrument which has been falsely made, completed or altered." P.L. §170.00[7].Penal Law §170.00[1] defines, in pertinent parts, a "written instrument" as "any instrument or article... containing written or printed matter...constituting a symbol or evidence of value...capable of being used to the advantage or disadvantage of some person." PL §170.00[1]. MetroCards are printed MTA instruments whose magnetic strip is given monetary value in order to attain legal access to ride New York City mass transit. The accusatory instrument states that the MetroCards in defendant's possession were in an altered state since the MetroCards were bent along the magnetic strip, which alters the value of the instrument. Therefore, the allegations sufficiently establish that the MetroCards constitute a forged instrument within the purview of Penal Law §§170.00[1] and [7], inasmuch as the MetroCards in defendant's possession were altered printed instruments with monetary value capable of being used to the disadvantage of the MTA.

Finally, defendant contends that the accusatory instrument fails to establish the defendant had knowledge the instrument was forged or the requisite intent to defraud. While it is true that the complaint does not specifically allege the defendant had knowledge, this is a situation where knowledge can be inferred from the physical characteristics of the alleged forged document described in the accusatory instrument. (*See, People v. Olwes*, 191 Misc 2d 275 [Crim.Ct. Kings Co. 2002](forged police parking plaque lacking official indicia of authenticity, including the large police department shield found on holographic plaques, the pre-printed serial number, the registration and vehicle identification numbers); *People v. Stephens*, 177 Misc 2d 819 [Crim. Ct. Kings, Co. 1998] (temporary New Jersey license plate lacking an expiration date, solid edges, and containing seals with uneven spacing and faded color). The court takes judicial notice that the physical characteristic of a MetroCard does not include a bend along the magnetic strip. (See, *People v. Roman*, 8 Misc 3d 1026(A) [Crim.Court, NY Cty 2005],

People v. Owens, 12 Misc 3d 600 [Supreme Court, Bx Cty 2006], *People v. Gottlieb*, 36 NY2d 629 [1975]). Here, the accusatory instrument alleges that the MetroCards were bent in a location on the magnetic strip in a manner that obliterates the encoded data, as well as alters the fare value of the card and whose forged nature are revealed from a simple observation. These allegations given "a fair and not overly restrictive or technical reading," (*People v. Casey*, 95 NY2d 354, 360 [2000]) sufficiently support the inference that defendant knowingly possessed a forged instrument. (*People v Gonzalez*, 184 Misc 2d 262, 264 [App Term, 1st Dept 2000][internal quotation marks omitted] ["In assessing the facial sufficiency of a misdemeanor complaint, the court is not required to ignore common sense or the significance of the conduct alleged"]). Therefore, although the court recognizes that mere possession of a forged document is not enough to presume knowledge of the ***4** forgery, where the circumstances are such that knowledge can be inferred from the physical characteristics of the allegedly forged instrument described in the accusatory instrument the accusatory instrument is sufficient to establish knowledge. (*People v. Johnson*, 65 NY2d at 561) *(See, People v. Olwes, supra ; People v. Stephens, supra*).

Accordingly, this court finds that the information is facially sufficient, inasmuch as the non-hearsay factual allegations clearly set forth the offense allegedly committed, and give the defendant notice sufficient to prepare a defense while ensuring that she would not be tried twice for the same offense. (*See People v. Kalin*, 12 NY3d 225 [2009], 2009 NY Slip Op 02446).

Defendant's motions to suppress physical evidence is granted to the extent of ordering a *Mapp/Dunaway* hearing. Defendant's motions to suppress or preclude identification testimony and any statements made by defendant are denied, inasmuch as the People have indicated that no identification testimony or statements made by defendant will be offered at trial. The defendant's motion for pretrial discovery is granted to the extent provided in the Voluntary Disclosure Form included with the People's response. The defendant's motion seeking Bill of Particulars is granted to the extent required by CPL §200.95 and not previously provided by the People's Affirmation in Opposition and Voluntary Disclosure Form. The *Sandoval* application is deferred to the trial court.

This constitutes the decision and order of the Court.

Dated:July 8, 2009_____

New York, New YorkHon. Marc J. Whiten, JCC

N.Y.City Crim.Ct. 2009.
People v Solyhanzadeh

24 Misc.3d 1221(A)

END OF DOCUMENT

People v. Tersta
16 Misc.3d 1135(A), 847 N.Y.S.2d 904
N.Y.City Crim.Ct. 2007.

16 Misc.3d 1135(A)847 N.Y.S.2d 904, 2007 WL 2582203, 2007 N.Y. Slip Op. 51704(U)

People of the State of New York Docket No. 2007NY024417
v.
Armand Tersta, Defendant.
2007NY024417

Criminal Court of the City of New York, New York County

Decided on August 28, 2007

CITE TITLE AS: People v Tersta

ABSTRACT

Crimes
Right to Speedy Trial
Unavailability of Defendant

People v Tersta (Armand), 2007 NY Slip Op 51704(U). Crimes-Right to Speedy Trial-Unavailability of Defendant. (Crim Ct, NY County, Aug. 28, 2007, Whiten, J.)

APPEARANCES OF COUNSEL

Appearance of Counsel:
For Defendant:
Robert M. De Poto. Esq.
For the People:
District Attorney, County of New York
by A.D.A. Emanuel R. Weisgras
One Hogan Place
New York, NY 10013

OPINION OF THE COURT

Marc J. Whiten, J.
Defendant, charged with eight counts of Aggravated Harassment in the Second Degree pursuant to P.L. § 240.30(1)(a), moves for an order dismissing the information pursuant to CPL § 30.30.

The Court has reviewed the Defendant's motion papers, the People's response and all relevant statutes and case law and, for the reasons discussed hereafter, denies the Defendant's motion for dismissal based on the grounds of speedy trial.

Pursuant to Criminal Procedure Law §30.30(1)(b), a motion to

dismiss must be granted where the people are not ready for trial within ninety (90) days of the commencement of a criminal action when the accusatory instrument charges the Defendant with violating a class A Misdemeanor as it does in the case at bar.Defendant argues that more than 90 days are chargeable to the People.

The Court finds that fifty seven (57) days are chargeable to the People as set forth below:

Dates	*Number of Days Charged*
February 20, 2007 to April 18, 2007	57
April 18, 2007 to June 6, 200	70
June 6, 2007 to August 22, 2007	0
August 22, 2007 to November 7, 2007	0
February 20, 2007 to April 18, 2007	

When a defendant is served with an appearance ticket, defendant's statutory right to a speedy trial does not attach until the first time defendant appears in court in response to the appearance ticket. *See*, CPL §30.30(5)(b); *see*, *also*People v. Paige, 475 NYS2d 762(124 Misc 2d 118) (1984). In the present case, Defendant first appeared in court on February 20, 2007 to respond to the appearance ticket. At the People's request and for further investigation, the case was adjourned to April 18, 2007. This period is chargeable to the people.

(57 days charged to the People)

April 18, 2007 to June 6, 2007

On April 18, 2007 the Defendant failed to appear, and a bench warrant was ordered and stayed to June 6, 2007. The case was adjourned to June 6, 2007 when Defendant subsequently appeared in court.

Criminal Procedure Law §30.30(4)(c)provides in substance that:

AIn computing the time within which the people must be ready for trial pursuant to subdivisions one and two, the following periods must be excluded: (c)(i) the period of delay resulting from the absence or unavailability of the defendant. A defendant must be considered absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence. A defendant must be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence; or (ii) where the defendant has either escaped from custody or has failed to appear when required after having previously been released on bail or on his own recognizance, and provided the defendant is not in custody on another matter, the period extending from the day the court issues a bench warrant pursuant to section 530.70 because of the defendant's failure to appear in court when required, to the day the defendant subsequently appears in the court pursuant to a bench warrant or voluntarily or otherwise;' JM.DP1 Defendant, in the instant case, contends, in substance, that Aa careful reading of Section 30.30(4)(c) shows that Defendant was not absent because the People knew about Defendant's whereabouts and Defendant was not attempting to avoid prosecution.' The Court agrees with the Defendant, that he was not Aabsent' on April 18, 2007, as defined by the relevant statute. The Defendant was however Aunavailable'. The full text of Section 30.30(4)(c) states that AA defendant must be considered unavailable whenever his location is ***2** known but his presence for trial cannot be obtained by due diligence.'

Here, on April 18, 2007, the Defendant, based upon the re-presentation of his counsel, could not be present in court because he was not only ill with pneumonia, but also in a cast. Even though the Defendant's whereabouts were known to the Court, his appearance could not be obtained by due diligence as Defendant's alleged medical condition precluded his appearance. The Court finds that the Defendant in the instant case was unavailable on April 18, 2007 causing the matter to be adjourned to June 6, 2007. That period of delay is excludable. *See*, CPL §30.30(4)(c)(i).

(0 day charged to the people)

June 6, 2007 to August 22, 2007

On June 6, 2007, the case was adjourned to August 22, 2007 for motion practice and decision. The Defendant filed a §30.30 speedy trial motion on July 5, 2007 and the People filed their response to the Defendant's motion on August 10, 2007. This period of time is excludable. *See*, CPL §30.30(4)(a); *see*, *also**People v. Worley*, 66 NY2d 523 (1985).

(0 day charged to the people)

August 22, 2007 to November 7, 2007

On August 22, 2007 the case was adjourned to November 7, 2007 for this Court to render a decision on Defendant's speedy trial motion. This period of time is charged to the Court and is excludable. *See*, CPL §30.30 (4)(a); *Seealso**People v. Blyden*, 79 AD2d 192 (1981).

(0 day charged to the People)

The Court finds the total amount of time charged to the People is 57 days, an amount which does not exceed the statutory limit of 90 days. Accordingly, Defendant's motion to dismiss on speedy trial grounds is denied. *See*, CPL 30.30 (1)(b).

This opinion constitutes the decision and order of the Court.

Dated:August 28, 2007_____

New York, NYMARC J. WHITEN, JCC

***3**

N.Y.City Crim.Ct. 2007.
People v. Armand Tersta

16 Misc.3d 1135(A)

END OF DOCUMENT

People v. Wright
26 Misc.3d 925, 893 N.Y.S.2d 729
NY,2009.

26 Misc.3d 925893 N.Y.S.2d 729, 2009 WL 5226918, 2009 N.Y. Slip Op. 29531

The People of the State of New York, Plaintiff
v
Lateek Wright, Defendant.
Criminal Court of the City of New York, New York County

January 7, 2009

CITE TITLE AS: People v Wright

HEADNOTE

Crimes
Tax Fraud
Failure to Collect Sales Tax

The information charging defendant with violating Tax Law § 1817 (d) (1) based upon allegations that a police officer observed defendant displaying and offering DVDs for sale on a public sidewalk without a certificate of authority to collect tax was facially insufficient. Although the allegations were sufficiently pleaded to support a reasonable cause to believe that while offering tangible personal property defendant did not display or possess a valid certificate of authority from the Department of Taxation pursuant to Tax Law § 1817 (a) (1), the issue was not simply whether a sale occurred, but rather whether defendant, pursuant to section 1817 (d) (1), "fail[ed] to charge separately the tax imposed." To support a charge of violating section 1817 (d) (1), the alleged facts had to support a finding or inference that defendant, a vendor, failed to collect taxes due upon the sale of tangible personal property. The information, however, failed to allege sufficient facts to support that defendant engaged in an actual sale or transfer of tangible property justifying the imposition of a tax, nor did it contain facts upon which it could be inferred that the defendant's acts of displaying the DVDs, or offering them for sale, rose to a level where collection of the sales tax was warranted (*see* Tax Law § 1105 [a]).

RESEARCH REFERENCES

Am Jur 2d, Indictments and Informations §§ 276–281; Am Jur 2d, Sales and Use Taxes §§ 73, 254.

Carmody-Wait 2d, Commencing the Prosecution; Grand Jury § 178:18.

LaFave, et al., Criminal Procedure (3d ed) § 19.3.

McKinney's, Tax Law § 1105 (a); § 1817 (a) (d) (1).

NY Jur 2d, Criminal Law: Procedure § 956; NY Jur 2d, Taxation and Assessment §§ 1703, 1882, 1938.

ANNOTATION REFERENCE

See ALR Index under Indictments and Informations; Sales and Use Taxes.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: information /s insuff! & sales /2 tax /p tangible /2 personal /2 property

APPEARANCES OF COUNSEL

Mark Scotto for defendant. *Robert M. Morgenthau*, *District Attorney* (*Stephanie Oliva* of counsel), for plaintiff.

***926** OPINION OF THE COURT

Marc J. Whiten, J.
In what appears to be a refractory impulse, both the People and defense counsel posit similarly flawed arguments regarding the sufficiency of the complaint herein, on grounds relating to Tax Law § 1817 (a), when in fact the charge referenced on the complaint is section 1817 (d) (1) of the Tax Law.

Mike Spick, author of Brassey's Modern Fighters: The Ultimate Guide to In-Flight Tactics, Technology, Weapons, and Equipment (Brassey's Inc., Dulles, Va., 2002), is quoted as stating that "[w]hereas knights of old wore armor of plate, the modern knights of the air wear the invisible but magic armor of confidence in technology." Accordingly, whereas confidence in technology in our day and age is accepted, blind reliance on such technology without human quality control is a recipe for disaster.

It appears here that either a macro programing error or a keystroke mistake lead to the boilerplate charge information before the court failing to conform to the Tax Law charge asserted. Thus, although the arguments of both the People and defense counsel are responsive to the boilerplate charge and the factual assertions, they fail to address the requirements of the charged Tax Law section.

It is without question that computers have become an indispensable part of the practice of law. Long gone are the days of the scribe or the typewriter. Today we largely depend on merge documents and codes to generate motions and replies. But we must remain alert to the admonition of Aldous Leonard Huxley who said that "[t]echnological progress has merely provided us with more efficient means for going backwards." What happens then when we fail to open a book or simply check the subdivision of a charge? The answer in the case at bar is a dismissal of the information as facially insufficient to support the charge.

****2** The defendant, Lateek Wright, is charged with violating Tax Law § 1817 (d) (1), sales and compensating use taxes. The defendant, by omnibus motion, moves to dismiss the information as facially insufficient, as well as for various other reliefs. The motion is decided as follows.

As stated above, defendant's motion to dismiss for facial insufficiency is granted. In order to be facially sufficient, an information must substantially conform to the formal requirements of CPL 100.15. Additionally, the factual portion and any accompanying***927** depositions must provide reasonable cause to believe the defendant committed the offense charged, as well as nonhearsay factual allegations of an evidentiary character which, if true, establish every element of the offense charged and defendant's commission thereof (CPL 100.15 [3]; 100.40 [1]; *see People v Dumas*, 68 NY2d 729 [1986];*see also People v Alejandro*, 70 NY2d 133 [1987]).

The requirement of nonhearsay allegations has been described as a "much more demanding standard" than a showing of reasonable cause alone (*People v Alejandro*, 70 NY2d at 139, quoting 1968 Study Bill and Commn Rep of Temp Commn on Rev of Penal Law and Crim Code, Introductory Comments, at xviii [emphasis omitted]); however, it is nevertheless a much lower threshold than the burden of proof beyond a reasonable doubt (*People v Henderson*, 92 NY2d 677, 680 [1999];*People v Hyde*, 302 AD2d 101 [1st Dept 2003]). Thus, "[t]he law does not require that the information contain the most precise words or phrases most clearly expressing the charge, only that the crime and the factual basis therefor be sufficiently alleged" (*People v Sylla*, 7 Misc 3d 8, 10 [2d Dept 2005]). Finally, where the factual allegations contained in an information "give an accused sufficient notice to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 360 [2000];*see also People v Konieczny*, 2 NY3d 569 [2004];*People v Jacoby*, 304 NY 33, 38-40 [1952];*People v Knapp*, 152 Misc 368, 370 [1934],*affd*242 App Div 811 [1934];*People v Allen*, 92 NY2d 378, 385 [1998];*People v Miles*, 64 NY2d 731, 732-733 [1984];*People v Shea*, 68 Misc 2d 271, 272 [1971]; *People v Scott*, 8 Misc 3d 428 [Crim Ct, NY County 2005]).

In the case at bar, the information alleges that in front of 218 West 125th Street in the County and State of New York, the following occurred:
"Deponent states that deponent observed the defendant display and offer for sale over one-hundred (100) digital video discs (DVD's).
"Deponent states that deponent observed defendant standing on the public sidewalk for at least five (5) minutes immediately behind a folding table and above-described merchandise was offered for sale thereon. Defendant was the only person who was uninterruptedly in immediate proximity to the ***928** merchandise and did not leave the merchandise unprotected during the entire period of the officer's observation.
"Deponent states that deponent observed defendant showing the merchandise to numerous people. Deponent further states that at the time of deponent's observation, defendant was not displaying or found in possession of a Certificate of Authority to Collect Tax and could not produce one when asked."

****3** Tax Law § 1817 (d) (1) states that
"[a]ny person (1) who willfully fails to charge separately the tax imposed under article twenty-eight of this chapter or to state such tax separately on any bill, statement, memorandum or receipt issued or employed by him upon which the tax is required to be stated separately . . . shall be guilty of a misdemeanor."

Persons required to collect taxes include every person who makes sales of tangible personal property as a vendor. Pursuant to section 1105 (a) of the Tax Law, imposition of the sales tax is paid "upon: (a) [t]he receipts from every retail sale of tangible personal property." (*See also Matter of Shanty Hollow Corp. v New York State Tax Commn.*, 111 AD2d 968, 970 [3d Dept 1985] ["Tax Law § 1105 (a) imposes a sales tax on the receipts from every retail sale of tangible personal property"].) Therefore, to support the charge of violating section 1817 (d) (1) of the Tax Law, the alleged facts must support a finding or inference that the defendant, a vendor, failed to collect taxes due upon the sale of tangible personal property.

Defendant contends the accusatory instrument is facially insufficient, since the factual allegations fail to allege facts establishing an actual selling of property or services. It is defendant's contention that to support the charge the factual allegations must allege facts establishing an actual sale of property or services, as the mere displaying of property for sale or services would not trigger the imposition of the sales and compensating use taxes requirements of Tax Law § 1817.

In opposition, the People contend that the accusatory instrument is sufficiently pleaded to establish the defendant's

commercial purpose. Specifically, the People argue that an assessment of the totality of circumstances, such as the alleged openness of the display, nature of the items and defendant's proximity to the items, sufficiently supports the inference of a commercial purpose within the purview of Tax Law § 1817.

***929** Although the court agrees with the People that the allegations are sufficiently pleaded to support a reasonable cause to believe that while offering tangible personal property defendant did not display or possess a valid certificate of authority from the Department of Taxation pursuant to section 1817 (a) (1), the issue before the court is not simply whether a sale occurred, but rather whether the defendant, pursuant to section 1817 (d) (1) of the Tax Law, "fail[ed] to charge separately the tax imposed."

This court finds that the information is facially insufficient to establish a reasonable cause to believe that defendant violated Tax Law § 1817 (d) (1), as the information in this complaint lacks sufficient factual allegations to establish that defendant failed to collect sales tax after a sale. The accusatory instrument fails to allege sufficient facts to support that defendant engaged in an actual sale or transfer of tangible property justifying the imposition of a tax, nor does the accusatory instrument contain facts upon which it could be inferred that the defendant's acts of displaying the DVDs, or offering them for sale, rose to a level where collection of the sales tax was warranted. The tax laws as defined require more than a mere inference that the defendant was engaged in a commercial purpose. The imposition of the tax requires a showing that the defendant engaged in a sale of tangible personal property without collecting the applicable sales taxes. (*See*Tax Law § 1105 [a].) Accordingly, defendant's motion to dismiss for facial insufficiency is granted.

In light of the fact that the court is granting the defendant's motion to dismiss, the ****4** balance of the omnibus motion is denied as moot.

Conclusion

For the reasons discussed above, defendant's motion to dismiss the accusatory instrument on the grounds of facial insufficiency is granted. The court directs that sealing be stayed for 30 days from the date of this decision to allow the People to file a timely, facially sufficient information if they so choose.

NY,2009.
PEOPLE v WRIGHT

26 Misc.3d 925

END OF DOCUMENT

People v. Chen Lee
19 Misc.3d 791, 860 N.Y.S.2d 845
NY,2008.

19 Misc.3d 791860 N.Y.S.2d 845, 2008 WL 795756, 2008 N.Y. Slip Op. 28112

The People of the State of New York, Plaintiff

v
Chen Lee, Defendant.
Criminal Court of the City of New York, New York County

March 26, 2008

CITE TITLE AS: People v Chen Lee

HEADNOTE

Licenses
Street Vendors
Sale of Decorated Coasters to Public Entitled to First Amendment Protection

Defendant's sale of decorated coasters to the public on the streets of New York City was entitled to First Amendment protection so as to preclude his prosecution for selling merchandise on the street without a vendor's license (*see* Administrative Code of City of NY § 20-453) in accordance with a 1997 federal court consent decree whereby the City agreed not to enforce the licensing requirement with respect to the general vending of "any paintings, photographs, prints and/or sculpture." The merchandise offered for sale by defendant had an exclusively expressive purpose and thus constituted protected artwork. Consequently, even though the licensing requirement is otherwise narrowly tailored to achieve the significant governmental objective of reducing urban congestion, the City was bound by the court-approved agreement.

RESEARCH REFERENCES

Am Jur 2d, Constitutional Law §§ 454, 459; Am Jur 2d, Occupations, Trades, and Professions § 2.

NY Jur 2d, Businesses and Occupations §§ 554, 555, 557.

ANNOTATION REFERENCE

Authorization, prohibition, or regulation by municipality of the sale of merchandise on the streets or highways, or their use for such purposes. 14 ALR3d 896.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: vendor /2 license /s street & first /2 amendment

APPEARANCES OF COUNSEL

Legal Aid Society, New York City (*Erin Darcy* of counsel), for defendant. *Robert M. Morgenthau*, *District Attorney*, New York City (*Mary Weisgerber* of counsel), for plaintiff.

OPINION OF THE COURT

Marc J. Whiten, J.
***792** Close to a half century ago, French-Algerian author, philosopher and Nobel Laureate Albert Camus wrote,

"Without freedom, no art; art lives only on the restraints it imposes on itself, and dies of all others."[FN1] The court is now called upon to consider here the extent to which the State might legitimately impose restraints on art, as sold to the public in the streets of New York City, a municipality widely regarded as a center of art and expressive freedom. The defendant, Chen Lee, is charged with selling coasters on the street without a vendor's license in violation of Administrative Code of the City of New York § 20-453. He now moves to dismiss the accusatory instrument, arguing that his alleged conduct is protected by the First Amendment of the United States Constitution, and that the complaint itself is facially insufficient.

In his motion, defendant claims that the items he is charged with selling are not "coasters," but are instead small tiles with photographs displayed on them, and that these items constitute "non-verbal artistic expression." Relying on *Bery v City of New York* (97 F3d 689 [2d Cir 1996]), defendant argues that the licensing requirements set forth in Administrative Code § 20-453 cannot be constitutionally enforced against him, because he was selling artwork. Defendant additionally argues that, pursuant to *People v Dumas* (68 NY2d 729 [1986]), the allegations set forth in the complaint do not establish reasonable cause to believe that defendant's conduct required him to be licensed as a vendor.

Defendant is charged with a violation of New York City's General Vendors Law (Administrative Code tit 20, ch 2, subch 27) which regulates the sale of goods and services in public places in order to preserve public health, safety and welfare. A general vendor is defined as one who "hawks, peddles, sells, leases or offers to sell or lease, at retail" goods and services other than food in a public space (Administrative Code § 20-452 [b]).Section 20-453 of the Administrative Code prohibits general vending without first obtaining a license from the Department of Consumer Affairs. An exception in the code explicitly permits the sale of newspapers, periodicals, books, pamphlets or other similar written material, but general vendors selling any other things may be fined, imprisoned for up to three months, or forced to relinquish their merchandise (Administrative Code §§ 20-468, 20-469, 20-472).

***793** FACIAL SUFFICIENCY

Defendant's facial insufficiency argument is without merit. An information is facially sufficient if it meets three requirements. First, it must substantially conform to the formal requirements of CPL 100.15. Additionally, the factual portion and any accompanying depositions must provide reasonable cause to believe the defendant committed the offense charged, as well as nonhearsay factual allegations of an evidentiary character which, if true, establish every element of the offense charged and defendant's commission thereof (CPL 100.15 [3]; 100.40 [1]; *see People v Dumas*, 68 NY2d 729 [1986];*see also People v Alejandro*, 70 NY2d 133 [1987]).

While the requirement of nonhearsay allegations (the prima facie requirement) has been described as a "much more demanding standard" than a showing of reasonable cause alone (*People v Alejandro*, 70 NY2d at 139, quoting 1968 Rep of Temp Commn on Rev of Penal Law and Crim Code, Introductory Comments, at xviii), it is nevertheless a much lower threshold than the "trial" burden of proof, beyond a reasonable doubt (*People v Henderson*, 92 NY2d 677, 680 [1999];*People v Hyde*, 302 AD2d 101 [1st Dept 2003]). Thus, "[t]he law does not require that the information contain the most precise words or phrases most clearly expressing the charge, only that the crime and the factual basis therefor be sufficiently alleged" (*People v Sylla*, 7 Misc 3d 8, 10 [2d Dept 2005]). Additionally, where the factual allegations contained in an information "give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 360 [2000];*see also People v Konieczny*, 2 NY3d 569 [2004];*People v Jacoby*, 304 NY 33, 38-40 [1952];*People v Knapp*, 152 Misc 368, 370 [1934],*affd* 242 App Div 811 [1934];*People v Shea*, 68 Misc 2d 271, 272 [1971];*People v Allen*, 92 NY2d 378, 385 [1998];*People v Miles*, 64 NY2d 731, 732-733 [1984]). In this case, the nonhearsay factual allegations clearly set forth the offense allegedly committed, and give the defendant notice sufficient to prepare a defense while ensuring

that he would not be tried twice for the same offense. Accordingly, this court finds that the information is facially sufficient.

****2** FIRST AMENDMENT

Defendant's First Amendment argument warrants more detailed consideration. It is well settled that for purposes of ***794** First Amendment analysis, the Constitution protects more than written or spoken words as mediums of expression, and instead includes "pictures, films, paintings, drawings, and engravings" (*Kaplan v California*, 413 US 115, 119 [1973]), as well as music (*Ward v Rock Against Racism*, 491 US 781 [1989]), theater (*Southeastern Promotions, Ltd. v Conrad*, 420 US 546 [1975]), and DVD recordings (*People v Fucile*, NYLJ, May 13, 2004, at 19, col 1 [Crim Ct, NY County]). The Second Circuit has held that "[v]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection" (*Bery v City of New York*, 97 F3d 689, 695 [2d Cir 1996]).

However, not every physical object with aesthetically engaging aspects is entitled to First Amendment protection (*see People v Saul*, 3 Misc 3d 260 [Crim Ct, NY County 2004] [decks of playing cards bearing photographic images of military and political figures associated with the Iraq war are not art, and, hence, not exempt from licensing requirement]). To the contrary, "[c]ourts must determine what constitutes expression within the ambit of the First Amendment and what does not. This surely will prove difficult at times, but that difficulty does not warrant placing all visual expression in limbo outside the reach of the First Amendment's protective arm" (*Bery v City of New York*, 97 F3d 689, 696 [1996]). In *Bery v City of New York*, the plaintiffs-appellants were visual artists who successfully sought an injunction against enforcement of Administrative Code § 20-453 on the basis that the expressive character of their artwork warranted First Amendment protection.

Under the holding in *Bery*, this court must first determine whether the sale of defendant's goods is entitled to First Amendment protection, or, more precisely, whether the expressive content of defendant's merchandise is such that First Amendment scrutiny is automatically applied to regulations that restrict their sale or dissemination. The framework for this determination, as set forth in *Mastrovincenzo v City of New York* (435 F3d 78 [2d Cir 2006]), involves several sequential steps. First, the court must determine whether or not the sale of defendant's goods is presumptively entitled to First Amendment protection, with the understanding that only certain items-paintings, photographs, prints and sculptures-trigger automatic review. If the item in question does not fall within one of these four classifications, its sale should be treated as potentially expressive and "[o]nce a court has determined that ***795** an item possesses expressive elements, it should then consider whether that item also has a common non-expressive purpose or utility" (*Mastrovincenzo*, 435 F3d at 95). However, "[t]he fact that an object serves some utilitarian purpose does not . . . automatically render it non-expressive; rather, upon a finding that the item in question possesses some common non-expressive purpose, a court should then determine whether that non-expressive purpose is dominant or not" (*id.*).

In considering whether an object's expressive purpose is dominant, courts
"may gauge the relative importance of the items' expressive character by comparing the prices charged for the decorated goods with the prices charged for similar non-decorated goods. If a vendor charges a substantial premium for the decorated work and/or does not sell the item without decoration, such facts would bolster his claim that ****3** the items have a dominant expressive purpose" (*id*. at 96).

Similarly, items that have only been modified or embellished with minor additions might be correctly classified as being commercial goods with expressive character that is not dominant. Other factors a court might apply include whether an artist's motivation for producing and selling his wares is a desire to communicate ideas, and whether a vendor (if other than the artist) claims to be engaging in self-expression through the sale of the items in question.

These factors are not mandatory, and, as an aggregate, they are not exhaustive; each case must be considered on its own merits.

Turning to the merchandise offered for sale by defendant, this court has performed an in camera inspection of the items seized from defendant by the police. This court reviewed 17 items, which are flat, rectangular tiles approximately four inches by four inches in size, made of a heavy ceramic. The edges are rough and somewhat uneven in texture, and the backs of the tiles are unfinished but partially covered by a thin layer of what looks to be cork. The decorated top surfaces of the tiles are covered by various photographic images, including a likeness of the deceased American actress Marilyn Monroe, local sports arenas, and the storefront of Vesuvio Bakery. While it is clear that most, if not all, of the images on the tiles are not original photographs taken by the defendant, many renowned modern artists, such as Andy Warhol, have utilized reproductions of popular images to great acclaim. ***796** The tiles appear to be display items not readily suitable for use as coasters, or for any other practical commonplace purpose. Accordingly, considering these items in light of the standards set forth previously, I find that they have a purpose that is exclusively expressive, and, that, as such, they warrant protection as expressive art.

Having found that the expressive content of defendant's creations is sufficient to warrant protection under the First Amendment, the court must now consider whether Administrative Code § 20-453 as applied to defendant can withstand the corresponding First Amendment scrutiny. As a content-neutral regulation,[FN2] Administrative Code § 20-453 should be subjected only to intermediate scrutiny by which a court must assess whether such a time, place and manner restriction is reasonable, narrowly tailored to serve a significant government interest, and leaves open ample other outlets for communication of the information (*Mastrovincenzo*, 435 F3d at 97-98, citing *Hobbs v County of Westchester*, 397 F3d 133, 148 [2d Cir 2005]).

In considering this question, the Second Circuit determined that "[t]here can be no doubt that New York City's avowed objectives in enforcing its licensing requirement, such as reducing sidewalk and street congestion in a city with eight million inhabitants, constitute 'significant government interests' " (*Mastrovincenzo*, 435 F3d at 100) and further found that "a fixed-ceiling licensing requirement represents a 'reasonable' ****4** means of controlling that congestion" (*id.*), ultimately concluding that Administrative Code § 20-453 is narrowly tailored to achieve the objective of reducing urban congestion (*id.* at 105). However, by consenting to a permanent injunction, the City of New York has agreed not to enforce the licensing requirements set forth in Administrative Code § 20-453 in relation to the general vending of "any paintings, photographs, prints and/or sculpture" (Permanent Injunction on Consent, dated Oct. 21, 1997; *Bery v City of New York*, US Dist Ct, SD NY, 94 Civ 4253 [MGC], Oct. 30, ***797** 1997). Since the court now finds that the items offered for sale by defendant constitute artwork within the meaning of the *Bery* injunction, and that they do not have any common nonexpressive purpose, the City is bound by the court-approved agreement in *Bery*.Accordingly, defendant's motion to dismiss is granted, and all other relief sought is denied as moot.

FOOTNOTES

FN1.*Socialism of the Gallows*, reprinted in Resistance, Rebellion and Death, at 171 (NY Knopf 1961).

FN2. Another threshold consideration is already settled, in that Administrative Code § 20-453 has been held to be a content-neutral regulation because it serves a purpose unrelated to the content of the regulated expression, that purpose being reducing pedestrian congestion, maintaining the tax base and economic viability of the City, and preventing the sale of stolen or defective merchandise (*Mastrovincenzo*, 435 F3d at 97); there is nothing presently before this court to disturb this holding.

NY,2008.
PEOPLE v CHEN LEE

19 Misc.3d 791

END OF DOCUMENT

People v. Eastmond
19 Misc.3d 824, 855 N.Y.S.2d 353
NY,2008.

19 Misc.3d 824855 N.Y.S.2d 353, 2008 WL 918269, 2008 N.Y. Slip Op. 28122

The People of the State of New York, Plaintiff
v
Daven Eastmond, Defendant.
Criminal Court of the City of New York, New York County

April 3, 2008

CITE TITLE AS: People v Eastmond

HEADNOTE

Crimes
Trespassing
Sufficiency of Accusatory Instrument-Inconsistencies between Allegations in Accusatory Instrument and Assertions in CPL 710.30 Notice

An accusatory instrument charging defendant with one count of criminal trespass in the second degree (Penal Law § 140.15) based upon allegations that defendant was observed by the arresting officer in the lobby of a residential apartment building in a location beyond both the vestibule and a posted sign bearing the words “No Trespassing” and “Tenants and Their Guests Only” and was unable to provide the identity of a resident by whom he had been invited was facially sufficient. The accusatory instrument gave defendant adequate notice to prepare a defense and was adequately detailed to prevent defendant from being tried twice for the same offense. The accusatory instrument was not required to allege that the managing agent or owner provided a list of the building's authorized residents to the police to sustain the trespass charge. Furthermore, the significant inconsistencies between the allegations in the accusatory instrument and the assertions in the People's CPL 710.30 notice indicating that defendant named the person whom he was there to visit, along with the person's apartment number, might affect the credibility or reliability of the People's evidence at other stages of the criminal proceeding but did not otherwise affect the facial sufficiency of the accusatory instrument.

RESEARCH REFERENCES
Am Jur 2d, Trespass §§ 134, 137, 151, 152, 162, 163, 182.

Carmody-Wait 2d, Criminal Procedure § 172:2380.

LaFave, et al., Criminal Procedure (3d ed) § 19.3.

McKinney's, CPL 710.30; Penal Law § 140.15.

NY Jur 2d, Criminal Law §§ 1630, 1641, 4065, 4067, 4068.

ANNOTATION REFERENCE

See ALR Index under Indictments and Informations; Trespass.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: criminal /2 trespass /4 second & sufficiency & inconsisten! contradict!

APPEARANCES OF COUNSEL

Robert Reyes for defendant. *Robert M. Morgenthau*, *District Attorney* (*Elise Roecker* of counsel), for plaintiff.

***825** OPINION OF THE COURT

Marc J. Whiten, J.

The defendant, Daven Eastmond, is charged with one count of criminal trespass in the second degree (Penal Law § 140.15), and has filed a motion seeking dismissal for facial insufficiency.

In order to be facially sufficient, an information must substantially conform to the formal requirements of CPL 100.15. Additionally, the factual portion and any accompanying depositions must provide reasonable cause to believe the defendant committed the offense charged, as well as nonhearsay factual allegations of an evidentiary character which, if true, establish every element of the offense charged and defendant's commission thereof (CPL 100.15 [3]; 100.40 [1]; *see People v Dumas*, 68 NY2d 729 [1986];*see also People v Alejandro*, 70 NY2d 133 [1987]).

The requirement of nonhearsay allegations has been described as a "much more demanding standard" than a showing of reasonable cause alone (*People v Alejandro*, 70 NY2d at 138, quoting 1968 Report of Temp Commn on Rev of Penal Law and Crim Code, Introductory Comments, at xviii); however, it is nevertheless a much lower threshold than the burden of proof beyond a reasonable doubt (*People v Henderson*, 92 NY2d 677, 680 [1999];*People v Hyde*, 302 AD2d 101 [1st Dept 2003]). Thus, "[t]he law does not require that the information contain the most precise words or phrases most clearly expressing the charge, only that the crime and the factual basis therefor be sufficiently ****2** alleged" (*People v Sylla*, 7 Misc 3d 8, 10 [2d Dept 2005]). Finally, where the factual allegations contained in an information "give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 360 [2000];*see also People v Konieczny*, 2 NY3d 569 [2004];*People v Jacoby*, 304 NY 33, 38-40 [1952];*People v Knapp*, 152 Misc 368, 370 [1934],*affd* 242 App Div 811 [1934];*People v Allen*, 92 NY2d 378, 385 [1998];*People v Miles*, 64 NY2d 731, 732-733 [1984];*People v Shea*, 68 Misc 2d 271, 272 [1971]; *People v Scott*, 8 Misc 3d 428 [Crim Ct, NY County [2005]).

Defendant was arrested in the lobby of a residential apartment building and charged with a single count of trespassing. The factual portion of the accusatory instrument presently ***826** before the court consists of a deposition from the arresting officer, along with a document titled "Managing Agent's Affidavit." This affidavit states, in sum and substance, that the building manager has asked the local police precinct to arrest anyone who is not a tenant or guest or invitee of a tenant if they are found trespassing in the building, because "trespassers have come to use the building as a place to buy, as well as use, drugs." In his supporting deposition, the arresting officer alleges, in sum, that defendant was observed in the lobby of a residential apartment building, in a location beyond both the vestibule and a posted sign bearing the words "No Trespassing" and "Tenants and Their Guests Only." The officer further alleges that the address provided by defendant as his own was a location other than where he was allegedly trespassing, and that defendant was unable to name any tenant by whom he had been invited into the premises. However, in notice provided to the defendant and the court pursuant to CPL 710.30, the People assert that, at the time of his arrest, defendant stated, "I'm here to visit my friend Jose. Jose lives in apartment 26."

Defendant argues that the complaint is facially insufficient because the affidavit provided by the managing agent does not specifically state that defendant did not have permission to be in the building to visit his friend, nor does it set forth the names and apartment numbers of the building's legitimate residents. Further, defendant argues that the supporting deposition from the arresting officer is insufficient to support the charges in that it does not state that the owner or managing agent provided a list of authorized residents for the building in question to the local police precinct for purposes of trespass arrests, nor does the supporting deposition specifically state that defendant did not have permission or authority to be in the building. Lastly, defendant argues that the supporting deposition is inadequate inasmuch it does not state that the person named by defendant as the person by whom he was invited into the building was not a legal resident of the dwelling.

Penal Law § 140.15 states that "[a] person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a dwelling," and Penal Law § 140.00 (5) states that a person enters or remains unlawfully "when he is not licensed or privileged to do so." It is well settled that "[i]n general, a person is 'licensed or privileged' to enter private premises when he has obtained the consent of the owner or another whose relationship to the premises gives him authority to ***827** issue such consent" (*People v Graves*, 76 NY2d 16, 20 [1990]). When such license or privilege is absent, a person is generally presumed to have entered or remained unlawfully, and the burden of proving this element is on the ****3**People (*see People v Brown*, 25 NY2d 374 [1969]).

Defendant's first two arguments, both of which are premised upon claimed inadequacies in the managing agent's affidavit and the arresting officer's supporting deposition, are unpersuasive. While it is true that the managing agent's affidavit adds little, if anything, to specific nonhearsay factual allegations in this case, this type of affidavit is not a necessary prerequisite for conversion of a trespass complaint into a facially sufficient information (*see People v Taveras*, 17 Misc 3d 1119[A], 2007 NY Slip Op 52067[U] [Crim Ct, NY County 2007]); for the purposes of facial sufficiency, this type of affidavit is superfluous.

It is also true that the arresting officer does not allege in his deposition that the owner or managing agent provided a list of the building's authorized residents to the police; however, this is not a requirement for facial sufficiency, nor does it undermine the facial sufficiency of the remainder of the instrument. In this instance, the officer's allegations set forth sufficient nonhearsay allegations, in that he alleges that he saw defendant in the lobby of a residential apartment building, beyond both the vestibule and a posted sign stating "No Trespassing" and "Tenants and Their Guests Only," and defendant was unable to provide the identity of a resident by whom he had been invited in. These allegations, standing alone, are facially sufficient. Defendant's argument that the officer must also have alleged that he had a list of tenants provided by the managing agent or owner is not only unnecessary for facial sufficiency, it is impractical as a matter of common sense. The number and density of multifamily dwellings in this county, as well as

the ensuing frequency of tenant turnover, make it impractical, if not impossible, to expect that police will investigate trespassing violations only when armed with the functional equivalent of the Manhattan telephone directory.

Clearly, whether a person was an unwanted intruder rather than an invited guest is a determination of considerable importance. In assessing whether or not a person has permission or authority to be in a premises, courts frequently consider whether or not a defendant has provided, at the time of arrest, the name or apartment number of a person by whom he or she was invited into a multiple dwelling (*see* ***828***People v Quinones*, 2002 NY Slip Op 50091[U] [App Term, 1st Dept 2002]; *People v Taveras*, 17 Misc 3d 1119[A], 2007 NY Slip Op 52067[U] [Crim Ct, NY County 2007]; *People v Outlar*, 177 Misc 2d 620 [Crim Ct, NY County 1998]; *People v Easton*, 16 Misc 3d 1105[A], 2007 NY Slip Op 51292[U] [Crim Ct, NY County 2007]), and whether or not a defendant has done so honestly (*see People v Babarcich*, 166 AD2d 655 [2d Dept 1990]). If a defendant does not provide a name or apartment number that can be verified on the scene, that fact may provide support for a trespass charge.

In this case, defendant's facial insufficiency argument makes explicit reference to the fact that the People have made two contradictory assertions on this important issue: the accusatory instrument alleges that defendant was unable to provide the identity of a resident of whom defendant was an invited guest, whereas notice made by the People pursuant to CPL 710.30 indicates that the defendant named the person whom he was there to visit, along with that person's apartment number. Defendant argues that the accusatory instrument is facially insufficient because it does not specifically state that the person named in the People's CPL 710.30 notice did not give defendant permission or authority to be in the building.

This raises the question of whether or not the court may consider the contents of ****4*** this document, which has not been formally offered as a supporting deposition, when assessing the facial sufficiency of the accusatory instrument. In *People v Casey* (95 NY2d 354 [2000]), the Court of Appeals held that annexing a temporary order of protection to a local criminal court information in order to establish that such an order was in effect is not required to have a facially sufficient information in a prosecution for criminal contempt, but doing so "would have been the far better practice" (*id.* at 359). Similarly, in *People v Henry* (167 Misc 2d 1027 [Nassau Dist Ct 1996]), the court held that submitted documents, other than supporting depositions, could be relied upon to support a finding of facial sufficiency of an accusatory instrument, so long as such documents meet one of the exceptions to the rule against hearsay. In *Henry*, the court found that an order of protection as well as stenographic notes taken by an official court reporter would both be admissible as business records and public documents.[FN*] Thus, it is clear that courts may look beyond the four corners of the document-the complaint-itself (*see People v Thomas*, 4 NY3d 143 [2005]),***829*** as well as beyond documents that have been prepared and submitted as supporting depositions.

However, the *Casey* Court also held that any challenge to the sufficiency of the contempt allegations "was a matter to be raised as an evidentiary defense to the contempt charge, not by insistence that [the] information was jurisdictionally defective without annexation of the order to that accusatory instrument" (95 NY2d at 360). Similarly, in this case, the apparent contradictions between the allegation in the complaint and the assertion in the CPL 710.30 notice, while significant, do not affect the facial sufficiency of the accusatory instrument, nor must they be rebutted in the accusatory instrument. "So long as the factual allegations of an information give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading" (95 NY2d at 360). Inconsistencies between allegations in the complaint and assertions in the CPL 710.30 notice are akin to mistakes or contradictions that may be discovered in police paperwork or other documents disclosed to the defense under *People v Rosario* (9 NY2d 286 [1961]), which types of inconsistencies may affect the credibility or reliability of the People's evidence at other stages in a criminal prosecution, but which do not affect the facial sufficiency of the accusatory instrument.

In conclusion, the court finds that the presently challenged trespassing charge is facially sufficient, inasmuch as it gives the defendant notice sufficient to prepare a defense and is adequately detailed to prevent defendant from being tried twice for the **5 same offense. Inconsistencies and contradictions, if any, may be explored and expanded or explained and extinguished at the proper point in the proceedings; this is not that point.

FOOTNOTES

FN* However, in *People v Pierre* (157 Misc 2d 812 [Crim Ct, NY County 1993]), the court, relying on *People v Ebramha* (157 Misc 2d 222 [Crim Ct, NY County 1993]), held that while business records may be relied upon to make out an element of an offense, "the complaint must contain allegations laying a foundation for the admission of the records relied upon . . . *and* where the truth of the contents of the business record is necessary to establish an element of an offense, a certified copy of the record itself must be filed as a supporting deposition" (*id.* at 815).

NY,2008.
PEOPLE v EASTMOND

19 Misc.3d 824

END OF DOCUMENT

People v. Fong
Slip Copy
N.Y.City Crim.Ct. 2007.

Slip Copy17 Misc.3d 1103(A), 2007 WL 2782363, 2007 N.Y. Slip Op. 51814(U)

The People of the State of New York, Plaintiff,
v.
Peng Fong, Defendant.
2007CN004374

Criminal Court of the City of New York, New York County

Decided on September 18, 2007

CITE TITLE AS: People v Peng Fong

ABSTRACT

Crimes

Trademark Counterfeiting
Sufficiency of Description of Trademark

People v Peng Fong, 2007 NY Slip Op 51814(U). Crimes-Trademark Counterfeiting-Sufficiency of Description of Trademark. Penal Law-§ 165.71 (Trademark counterfeiting, third degree). (Crim Ct, NY County, Sept. 18, 2007, Whiten, J.)

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OPINION OF THE COURT

Marc J. Whiten, J.
The defendant, Peng Fong, is charged with a violation of Penal Law §165.71(Trademark Counterfeiting in the Third Degree), and Administrative Code §20.453 (Unlicensed General Vendor). Defendant is charged with a single count of the above offenses.

The defendant has moved by omnibus motion for the following: (1) Dismissal for Facial Insufficiency of the charge of Trademark Counterfeiting in the Third Degree; (2) Preclusion of any statement or identification of defendant; (*3)* Mapp/Dunawayhearing(4) *Sandoval* Hearing; (5) Bill of Particulars; and(6)Discovery.

The Court has reviewed the Defendant's motion papers, the People's response and all relevant statutes and case law and, for the reasons discussed hereafter, denies the Defendant's motion for dismissal based on the grounds of facial insufficiency.

The defendant's omnibus motion is decided as follows:

DISMISSAL FOR FACIAL INSUFFICIENCY

The defendant is charged with Trademark Counterfeiting in

the Third Degree PL § 165.71).

The accusatory instrument, in pertinent part, charges ***2** defendant with the commission of the aforementioned crime on June 26, 2007, at about 14:50 hours at in front of 230 Canal Street in the County of New York, State of New York

under the following circumstances:

Deponent states that based on the supporting deposition made by Police Officer David Perez, shield No.29497, defendant displayed and offered for sale more than 10 Sony DVDs. Police Officer David Perez examined the above named merchandise and based on his training and experience, the merchandise bears a counterfeit SONY trademark. It is substantially the same as the genuine trademark except that the counterfeit has: poor quality artwork has no studio logo on packaging and the movie is currently on theatrical release, and the genuine trademark has: professional quality artwork has studio logo on disc or packaging.

An affidavit of the representative of the trademark, states that the trademark is in use and registered.

An information is facially sufficient if it contains nonhearsay factual allegations of an evidentiary character which establish, if true, every element of the offense charged and defendant's commission thereof (CPL §§100.15[3] and 100.40[1]); *See*People v. Dumas, 68 NY2d 729 (1986); *Seealso*People v. Alejandro, 70 NY2d 133 (1987). Where the factual allegations contained in an information "give an accused sufficient notice to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading".*See*People v. Casey, 95 NY2d 354, 390 (2000); *Seealso*People v. Konieczny, 2 NY3d 569 (2004).

Defendant here challenges the facial sufficiency of the accusatory instrument. Confronted with a similar issue, the Appellate Division 1st Department in *People v. Guan*[FN1] citing *People v. Thiam*[FN2] defined the elements required in an accusatory instrument for the above charge. In order to charge a defendant with trademark counterfeiting in the third degree, the complaint must contain the following:

First, the accusatory instrument must allege that at a specified time and location defendant "display[ed] and offer[ed] ***3** for sale" counterfeit trademark items. In the case at bar, the complaint alleged, in substance, that on June 26, 2007, at about 14:50 hours at in front of 230 Canal Street in the County of New York, State of New York the police observed defendant display and offer for sale more than 10 SONY DVDs. The first requirement is therefore met in this case.

Second, the complaint must identify by name or description the actual trademark which has allegedly been imitated. *See*, *People v. Ensley*,183 Misc 2d 141 (1999); *seealsoPeople v. Guan*, *Supra*.

Here, the accusatory instrument specifically states the merchandise bears a counterfeit SONY trademark. It is substantially the same as the genuine trademark except that the counterfeit has "poor quality artwork [and] has no studio logo on packaging" while the genuine trademark has "professional quality artwork [and] has studio logo on disc or packaging".

It is important to analyze the argument raised by defendant pertaining to this particular condition. In support of defendant's motion, defendant cited *People v. Niang*[FN3] and *People v. Wu Chang*[FN4] where the accusatory instruments were dismissed for facial insufficiency based upon the lack of description of the Rolex trademark in the latter case and the GUCCI trademark in the second case. Those trademarks are represented by particular symbols which identify them. The failure of the accusatory instruments in those matters to describe and identify the trademark symbols in detail represented a fatal flaw therein, rendering those complaints facially insufficient.

In the case at bar, the trademark for the SONY corporation is symbolized not by an artist's designed symbol, but

rather by the four capital letters “SONY”. The reference to those capitalized letters is sufficient therefore to identify the trademark. The type of trademark designs in the *Niang* and *Wu Chang* cases are inapplicable to the analysis of the trademark in the instant case.

Finally, the accusatory instrument must show that the trademark alleged to be infringed is currently registered. *See* PL §165.70(1); *See*, *People v. Cisse*, 171 Misc 2d 185 (1996); *Seealso**People v. Ensley*, 183 Misc 2d 141 (1999).

In the present case, the file contains a sworn affidavit of Mr. James Andrade, an authorized representative of SONY as well as other trademarks, which states that the trademark is currently in use and registered at the US Patent Trademark Office. The last requirement is therefore satisfied.***4**

Accordingly, since the complaint met all the legal requirements in support of the charge of Trademark Counterfeiting in the Third Degree, defendant's motion to dismiss for facial insufficiency is denied.

PRECLUSION

The defendant asks the court to preclude any statement or identification testimony for which proper notice has not been given.

The People are required to give advance notice to the defendant of their intention to introduce at trial any potentially suppressible statements made by the defendant to a public servant (CPL § 710.30[1]). Such notice must be served within fifteen days after arraignment and before trial (CPL § 710.30 [2]). A failure to give the required notice before trial mandates exclusion of the statement. *See**People v Briggs*, 38 NY2d 319(1975).

The Voluntary Disclosure Form shows that the People do not intend to offer any statement or identification testimony at trial. Therefore, defendant's motion to preclude statement and identification testimony is premature. Further motions may be renewed in the event the People attempt to offer unnoticed statement or identification testimony.

MAPP/DUNAWAY HEARING/SUPPRESSION

Defendant's motion requesting a Mapp/Dunaway hearing is granted.

SANDOVAL/MOLINEUX

Defendant's motion to preclude the use of defendant's criminal history or uncharged bad acts is referred to the trial court.

BILL OF PARTICULARS AND DISCOVERY

Defendant's motion for a Bill of Particulars (5) and additional discovery (6) is denied. The Voluntary Disclosure Form is sufficient at this time.

The People are reminded of their continuing obligation to supply *Brady* material.

This opinion constitutes the decision and order of the Court.

Dated:September 18, 2007_____

New York, NYMarc J. Whiten, JCC

***5**

FOOTNOTES

FN1.*People v. Guan*, 2003 NY Slip Op 50878[U], 2003 NY Misc. LEXIS 585.

FN2.*People v. Thiam*, 189 Misc 2d 810;736 NYS2d 846 (2001)

FN3.160 Misc 2d 500 (1994)

FN4. Misc 3d 377 (2004)

N.Y.City Crim.Ct. 2007.
People v Peng Fong

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People v. Womack
18 Misc.3d 1135(A), 859 N.Y.S.2d 898
N.Y.City Crim.Ct. 2008.

18 Misc.3d 1135(A)859 N.Y.S.2d 898, 2008 WL 482474, 2008 N.Y. Slip Op. 50319(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

The People of the State of New York
v.
William Womack, Defendant.
2006NY02213

Criminal Court of the City of New York, New York County

Decided on February 22, 2008

CITE TITLE AS: People v Womack

ABSTRACT

Crimes
Arrest
Probable Cause

Crimes
Unlawful Search and Seizure

People v Womack (William), 2008 NY Slip Op 50319(U). Crimes-Arrest-Probable Cause. Crimes-Unlawful Search and Seizure. (Crim Ct, NY County, Feb. 22, 2008, Whiten, J.)

APPEARANCES OF COUNSEL

For the People:
ADA Tracy Conn
For the Defendant
The Legal Aid Society
Hara Robrish, Esq.

OPINION OF THE COURT

Marc J. Whiten, J.
The defendant, William Womack, is charged with assault, disorderly conduct, resisting arrest, menacing and harassment. The defendant moved in an omnibus motion for suppression of physical evidence, and after a hearing in front of a Judicial Hearing Officer (see CPL 255.20 [4]) suppression was denied. This court certified the Hearing Officer's findings, and defendant now moves to reargue the motion for suppression, claiming that the court misapprehended or overlooked matters of law (CPLR 2221 [d] [2]).

The testimony at the suppression hearing established that defendant had an encounter with the police while he was standing in proximity to a number of individuals on a busy sidewalk outside of a performance venue. At that time, defendant and the other individuals were asking passersby if they needed tickets, presumably to an event taking place that evening. A police officer approached them and told this group to disperse, due to the fact that they blocked the sidewalk and pedestrians had to walk around them. When told to move elsewhere, all of the other persons complied except defendant, who declined to do so. When instructed again to move, defendant did not do so and instead, "stepped up to" the police officer, stating "the bigger they are, the ***2** harder they fall," while at the same time clenching his fists at his sides. It was at this moment that the officer decided to issue a summons to the defendant, and in furtherance of this intention, the officer took hold of the defendant's arm and moved him toward the side of a building nearby. The encounter escalated at that point, inasmuch as the defendant began flailing his arms as though to disengage the officer's grasp, and then swung his closed fist at the police officer's upper body, without making contact. Another police officer became involved, whereupon defendant was physically subdued, handcuffed and searched on the scene, which search recovered $680 in United States currency and twenty-two tickets (presumably for upcoming events at local performance venues) from defendant's pants pocket.

Under CPLR 2221(d)(2), a motion for leave to re-argue "shall be based upon matters of fact or law allegedly

overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered in the prior motion."

Defendant seeks reconsideration of the motion to suppress physical evidence, arguing, in sum, that matters of fact and law were misapprehended or overlooked by the court, inasmuch as there was no probable cause to support the officer's belief that a crime was committed and that defendant was the person who committed such crime.

Defendant secondarily argues that suppression is required because the People failed to overcome the presumption that the warrantless search of defendant was unreasonable by failing to prove that the tickets recovered from defendant were not contained in envelopes, the presence of which would require a warrant in order for the search to be authorized. Defendant's motion to reargue is decided as follows.

The hearing record is not clear as to what particular offense the officer believed defendant had committed when the officer decided to issue a summons to defendant, but, based on the evidence presented and the offenses actually charged, it could only have been disorderly conduct or menacing FN1. Once defendant took a swing at the police officer, the officer decided to arrest defendant, instead of merely issuing a summons. The question then becomes whether or not the arresting officer had probable cause to believe the defendant had committed a crime at any point during the encounter with defendant.

Taking the alleged events sequentially, it is clear at the outset that the People failed to provide proof of probable cause to support a charge of disorderly conduct, although not for the reasons argued by defendant. Under PL 240.20(5), the subsection recited in the complaint, a person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he obstructs vehicular or pedestrian traffic. The defendant relies on *People v Jones* (9 NY3d 259 [2007]) for the proposition that there is no probable cause to arrest a person who, by standing still on a sidewalk, creates a situation whereby other pedestrians must walk around such person. However, this reliance is somewhat misplaced, inasmuch as the *People v Jones* analysis and test would only apply here to an arrest sought for ***3** disorderly conduct. Here, however, the officer did not initiate an arrest due to an alleged violation of PL 240.20 (5), but rather, intended to issue a summons. In point of fact, the testimony adduced at the suppression hearing failed to establish that the police officer observed that defendant, standing alone after the other individuals had departed, was in any way engaging in the activity described in the statute, with the requisite intent, so as to give the officer probable cause to summons or arrest defendant for this offense.

Similarly, the People failed to offer proof of specific facts supporting the existence of probable cause to arrest defendant for menacing. The People's sole witness, the police officer, testified quite clearly that he neither felt "afraid" nor was he "scared that defendant was going to hurt [him]" when defendant clenched his fists and stated to him "the bigger they are, the harder they fall." A person is guilty of menacing under PL 120.15 when, by physical menace, he or she actually places another person in fear of death, imminent serious physical injury or physical injury, or when he or she merely attempts to do so. Thus, a plain reading of the statute would support a finding of probable cause on these facts, in that it appears that defendant at least attempted to place the police officer in fear. However, this court is constrained by appellate authority which has consistently required some proof of actual fear as a necessary element of the offense (*see In re Orenzo H.*, 33 AD3d 492 [1st Dept 2006]; *Yvette H. v Michael G.*, 270 AD2d 123 [1st Dept 2000]; *In the Matter of Wanji W.*, 305 AD2d 690 [2d Dept 2003]; *In the Matter of Michael H.*, 294 AD2d 364 [2d Dept 2002];*In the Matter of Steven W.*, 294 AD2d 370 [2d Dept 2002]).

The officer's attempts to issue a summons to defendant for disorderly conduct and menacing were not supported by probable cause; therefore defendant's attempts to pull his arm away from the officer's grasp were not resistance to an authorized arrest (*see PL 205.30and PL 35.27*; *see also People v Jensen*, 86 NY2d 248 [1985];*People v Peacock*, 68

NY2d 675 [1986];*People v Parker*, 33 NY2d 669 [1973]). Accordingly, this court finds that the People failed to offer proof of specific facts supporting probable cause for the charge of resisting arrest under PL 205.30, for any actions taken by defendant before he swung his fist at the police officer.

However, when defendant swung his fist at the officer, a line was crossed, and it was a line almost as clearly defined as the equator or the 38th parallel. When defendant swung his fist at the officer, he created probable cause for his subsequent arrest. Unlike the alleged offenses discussed thus far, the People did provide proof of specific facts supporting the existence of probable cause for the arrest of defendant for attempted assault. It is well settled that a person may not use physical force to resist an arrest, whether authorized or unauthorized (PL 35.27; *see also People v Voliton*, 83 NY2d 192 [1994]). Of course, this does not prohibit an individual from protecting him or her self from an unjustified beating by police (*see People v Sanza*, 37 Ad2d 632 [2d Dept 1971]), nor is it a complete bar to the right of an individual to use some necessary force where an arrest is unlawful (*see People v Makysmenko*, 105 Misc 2d 368 [1980]); nevertheless, the purpose of this section is to discourage street combat as a means of determining the validity of an arrest.

In this instance, there was no proof offered to show that the police officer used excessive force; rather, the proof presented by the People showed that the defendant ***4** attempted to strike the police officer with a closed fist when the officer had merely taken hold of defendant's arm and moved him toward the building line with the intention of issuing a summons. At the moment that defendant attempted to strike the officer with his fist, the officer had probable cause to believe defendant committed a crime, and the subsequent arrest of defendant was fully authorized. Had the defendant accepted his summons with a greater degree of equanimity than he displayed that night, this matter may have been resolved with a dismissal, but defendant chose another course.

Thus, the property recovered from the search of defendant was not the fruit of police illegality, because, while there was no probable cause relative to the earlier actions of defendant for which the officer sought to issue a summons, there certainly was probable cause for the arrest that resulted after defendant altered the course of the encounter by attempting to assault the officer. Accordingly, suppression of the physical evidence is not warranted on this basis.

Defendant's second argument concerns whether or not the People were able to prove that the search incident to defendant's arrest was proper. This argument rests, in part, on the inability of the officer to recall when testifying at the suppression hearing, whether or not said tickets were inside of envelopes when the tickets were recovered from defendant's pants pocket. (At the suppression hearing, the officer did not concede that the tickets may have been in envelopes, as defendant asserts in the motion to reargue; to the contrary, the record clearly indicates that the officer testified that he simply did not recall.) In light of this, the defendant, relying on *People v Berrios*, 28 NY2d 361 (1971), argues that the People failed to show that the tickets were not in a closed container, and therefore, by inference, they have not met their burden of going forward to show the legality of the police conduct in question.

Defendant's argument in unpersuasive, for two reasons. First, as a matter of law, the People do not have the affirmative burden of demonstrating that evidence recovered pursuant to a search incident to a lawful arrest was not inside of a container, let alone a closed one. If the presence of a container is established, whether or not the container itself was open or closed may be of some moment (*see see also People v Rosado*, 214 AD2d 375 [1st Dept 1995]); however, the defendant does not offer, nor is this court aware of, any authority requiring the prosecution to prove that evidence was not in a container in order to meet their burden of establishing justification for the warrantless search. More generally, the prosecution is not required to rule out or disprove every possible fact that might weigh in favor of suppression in order to meet their burden of going forward. In making this argument, defendant seeks to extend the established precedent regarding searches of other types of containers such as suitcases (*see People v DeSantis*, 46 NY2d 82 [1978]), duffel bags (*see People v Gokey*, 60 NY2d 309 [1983]), handbags (*see People v Johnson*, 59 NY2d 1014 [1983]), and briefcases (*see People v Smith*, 59 NY2d 454 [1983]) to a situation where

there is no evidence of a container whatsoever. The fact that defense counsel's inquiry as to the existence of envelopes on cross-examination was met with the officer's lack of recollection does not prove that the tickets were inside of envelopes. To the contrary, when a defendant contends that a police officer has testified untruthfully at a suppression hearing, "the defendant must still refute the testimony of ***5** the police officer," (*People v Berrios*, 28 NY2d 361, 368 [1978]). Thus, this court need not reach the question, however intriguing and novel, as to whether or not an envelope would be considered a container for purposes of this type of analysis.

Second, upon a review of the record, it is clear that the search that produced the tickets was proper in all respects: it was conducted contemporaneously with the arrest (*see People v Gokey*, 60 NY2d 309 [1983]), at the same location as the arrest (*see People v Wylie*, 244 AD2d 247 [1st Dept 1997]) and was justified by the need for safety of the officers. An officer has inherent common-law authority to conduct a search for safety purposes in circumstances that reveal only the commission of a violation (*see People v King*, 102 AD2d 710 [1st Dept 1984]); it only stands to reason that such a search is permissible when a higher level of offense has occurred. Additionally, even though the officer did not affirmatively state why he searched the defendant after he had been subdued and arrested,[FN2] it is reasonable to infer from the events leading up to defendant's arrest and the totality of the circumstances that the officer had both a proper basis to arrest defendant as well as a proper basis to search defendant for concealed weapons, to wit, the safety of the public and the arresting officer and the protection of evidence from destruction or concealment (*see People v Gokey*, 60 NY2d 309 at 311 [1983],*citing People v Smith*, 59 NY2d 454, 458 [1983],*and People v Belton*, 55 NY2d 49, 52-53 [1982]).

For the foregoing reasons, the court denies defendant's motions to reargue and to suppress the physical evidence recovered from defendant. However, in light of the court's findings in reaching this decision, counsel for either side may make any appropriate motions regarding the particular charges in the complaint.

This constitutes the decision and order of the Court.

Dated:February 22, 2008

New York, New York

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Hon. Marc J. Whiten, JCC

FOOTNOTES

FN1. Harassment was not one of the original charges on the petition, and was added by way of handwritten amendment by the court on July 17, 2006.

FN2. The record does reflect that the People did ask the officer why he searched defendant but the Judicial Hearing Officer sustained an objection to the question.

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22 Misc.3d 306866 N.Y.S.2d 564, 2008 WL 4756648, 2008 N.Y. Slip Op. 28428

The People of the State of New York, Plaintiff
v
Edward Beam, Defendant.
Criminal Court of the City of New York, New York County

October 30, 2008

CITE TITLE AS: People v Beam

HEADNOTES

Crimes
Reckless Endangerment
Sufficiency of Accusatory Instrument

(1) The count of an information charging defendant with reckless endangerment (Penal Law § 120.20) based upon allegations that the arresting officer observed defendant at 4:00 a.m. on a street corner in Manhattan holding "what appeared to be a marijuana cigarette" in his left hand, and that defendant, when approached by the officer, ran into traffic on a public highway "where multiple vehicles were in motion," was dismissed for facial insufficiency pursuant to CPL 100.15 (3) and 100.40 (1). In order to establish that defendant engaged in reckless endangerment, the risk created by his conduct must have been foreseeable, and the conduct must have actually created a risk of serious physical injury. The allegations herein were insufficient to find or infer that a substantial and unjustifiable risk of serious physical injury was created by defendant's hasty jaywalking.

Crimes
Obstructing Governmental Administration
Sufficiency of Accusatory Instrument

(2) The count of an information charging defendant with obstructing governmental administration in the second degree (Penal Law § 195.05) based upon allegations that the arresting officer observed defendant at 4:00 a.m. on a street corner in Manhattan holding "what appeared to be a marijuana cigarette" in his left hand, and that defendant, after running into traffic on a public highway when approached by the officer, threw away the item, thereby preventing the officer from recovering it, was dismissed for facial insufficiency pursuant to CPL 100.15 (3) and 100.40 (1). In the absence of some express and lawful order, directive or command by the officer to defendant to engage in, or refrain from, some particular action, defendant's disposal of the unidentified object, which the officer only "assumed" was contraband, did not constitute a legally sufficient basis for the charge of obstructing governmental administration. No statute or legal concept requires a citizen, by premonition or prognostication, to divine an

officer's future intent to effectuate an arrest by reading the officer's mind.

Crimes
Tampering with Physical Evidence
Sufficiency of Accusatory Instrument

(3) The count of an information charging defendant with attempted tampering with physical evidence (Penal Law §§ 110.00, 215.40 [2]) based upon allegations that the arresting officer observed defendant at 4:00 a.m. on a street corner in Manhattan holding "what appeared to be a marijuana cigarette" in his left hand, and that defendant, after running into traffic on a public highway when approached by the officer, threw away the item, thereby preventing the officer from recovering it, was dismissed for facial insufficiency pursuant to CPL 100.15 (3) and 100.40 (1). The information failed to allege what, if anything, the officer was able to smell or observe that made him believe that the item discarded by defendant was marijuana. If the discarded item was not something that was illegal to possess, there would be no basis ***307** upon which to infer that defendant intended to prevent the production of the item in any prospective proceeding. Furthermore, discarding items before or while fleeing the police is not the type of conduct proscribed by the statute.

RESEARCH REFERENCES

Am Jur 2d, Assault and Battery § 21; Am Jur 2d, Indictments and Informations §§ 95, 96, 101, 126, 127, 143; Am Jur 2d, Obstructing Justice §§ 34-37, 54-56, 59, 61, 64-66, 77.

Carmody-Wait 2d, Criminal Procedure §§ 172:827, 172:837, 172:838.

LaFave, et al., Criminal Procedure (3d ed) § 19.3.

McKinney's, CPL 100.15 (3); 100.40 (1); Penal Law §§ 120.20, 195.05 (1); § 215.40 (2).

NY Jur 2d, Criminal Law: Procedure §§ 947, 955, 956; NY Jur 2d, Criminal Law: Substantive Principles and Offenses §§ 449, 452, 453, 1327, 1330, 1332, 1334, 1335, 1553-1555, 1558.

ANNOTATION REFERENCE

What constitutes obstructing or resisting officer, in absence of actual force. 66 ALR5th 397.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: information /5 facial! /2 insufficien! & suspicious /5 behavior

APPEARANCES OF COUNSEL

Legal Aid Society, New York City (*Melissa Kaplan* of counsel), for defendant. *Robert M. Morgenthau*, *District Attorney*, New York City (*David Stuart* of counsel), for plaintiff.

OPINION OF THE COURT

Marc J. Whiten, J.

In a time when individual liberty is under attack and when many in our citizenry and government seem predisposed to offer up an unidentified degree of personal freedom in exchange for the perceived premium of greater security, we must resist striking an unwise bargain in the interpretation and administration of our laws. As founding father Benjamin Franklin observed, "They that give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." In this ***308** case, the court is called upon to consider the degree to which an individual's freedom can be constrained by police suspicion and preliminary investigation. The defendant, Edward Beam, is charged with reckless endangerment (Penal Law § 120.20), obstruction of governmental administration in the second degree (Penal Law § 195.05) and attempted tampering with physical evidence (Penal Law §§ 110.00, 215.40 [2]), and has moved to dismiss the information as facially insufficient, as well as for various other relief. For the following reasons, defendant's motion is granted and this information is dismissed.

In order to be facially sufficient, an information must substantially conform to the formal requirements of CPL 100.15. Additionally, the factual portion and any accompanying depositions must provide reasonable cause to believe the defendant committed the offense charged, as well as nonhearsay factual allegations of an evidentiary character which, if true, establish every element of the offense charged and defendant's commission thereof (CPL 100.15 [3]; 100.40 [1]; *see People v Dumas*, 68 NY2d 729 [1986];*see also People v Alejandro*, 70 NY2d 133 [1987]).

The requirement of nonhearsay allegations has been described as a "*much more****2** *demanding standard*" than a showing of reasonable cause alone (*People v Alejandro*, 70 NY2d at 139, quoting 1968 Report of Temp St Commn on Rev of Penal Law and Crim Code, Intro Comments, at xviii); however, it is nevertheless a much lower threshold than the burden of proof beyond a reasonable doubt (*People v Henderson*, 92 NY2d 677, 680 [1999];*People v Hyde*, 302 AD2d 101 [1st Dept 2003]). Thus, "[t]he law does not require that the information contain the most precise words or phrases most clearly expressing the charge, only that the crime and the factual basis therefor be sufficiently alleged" (*People v Sylla*, 7 Misc 3d 8, 10 [2d Dept 2005]). Finally, where the factual allegations contained in an information "give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 360 [2000];*see also People v Konieczny*, 2 NY3d 569 [2004];*People v Jacoby*, 304 NY 33, 38-40 [1952];*People v Knapp*, 152 Misc 368, 370 [1934],*affd*242 App Div 811 [1934];*People v Allen*, 92 NY2d 378, 385 [1998];*People v Miles*, 64 NY2d 731, 732-733 [1984];*People v Shea*, 68 Misc 2d 271, 272 [1971]; *People v Scott*, 8 Misc 3d 428 [Crim Ct, NY County 2005]).

***309** In this case, the information alleges that at four o'clock in the morning at 46th Street and 9th Avenue in New York County, a police officer observed the defendant holding "what appeared to be a marijuana cigarette" in his left hand. The information further alleges that when the officer approached the defendant, the defendant ran into traffic on a public highway "where multiple vehicles were in motion," and that the officer observed the defendant throw the item he held in his left hand, thereby preventing the officer from recovering the item.

(1) Defendant argues that all three counts in the accusatory instrument are facially insufficient. Regarding the reckless endangerment charge, defendant argues that the allegations are insufficient to establish every element of the offense, because "running into traffic" does not demonstrate a "substantial risk of serious physical injury" to another person. Penal Law § 120.20 states that a person is guilty of reckless endangerment in the second degree when he or she engages in conduct which creates a substantial risk of serious physical injury to another person. In light of the fact that "serious physical injury" is defined as that which "creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law § 10.00 [10]), the defendant's argument is persuasive. It is certainly possible, and possibly even somewhat likely, that defendant or another person might have experienced some sort of injury from an automobile accident caused by defendant's sudden and swift entry into the roadway. Nevertheless, on the facts alleged, this court can neither find nor infer that a substantial and unjustifiable risk of serious physical

injury was created by defendant's hasty jaywalking. In order to establish that defendant engaged in reckless endangerment, the risk created by a defendant's conduct must be foreseeable (*see* *People v Reagan*, 256 AD2d 487 [2d Dept 1998]) and the conduct must actually create a risk of serious physical injury (*see* *Matter of Kysean D.S.*, 285 AD2d 994 [4th Dept 2001]). Accordingly, the count is dismissed.

(2) The count charging obstruction of governmental administration is likewise facially insufficient. Regarding the obstructing charge, Penal Law § 195.05 provides that
"[a] person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts***310** to prevent a public servant from performing an official function, by means of intimidation, physical force or ****3** interference, or by means of any independently unlawful act."

To be facially sufficient, the charge of obstructing governmental administration must allege an act of (1) intimidation, (2) physical force or interference, or (3) an independently unlawful act (*see* *People v Stumpp*, 129 Misc 2d 703, 704 [Suffolk Dist Ct 1985], *affd*132 Misc 2d 3 [App Term, 2d Dept 1986]). No existing statute or legal concept requires a citizen, by premonition or prognostication, to divine an officer's future intent to effectuate an arrest by reading the officer's mind. Absent some express and lawful order, directive or command by a police officer to engage in, or refrain from, some particular action, the defendant's disposal of an unidentified object-which the police only "assumed" was contraband-is not inculpatory, and certainly not a basis for a legally sufficient charge of obstructing governmental administration.

The obvious and well-settled intent of the statute is to allow police officers to go about their business without any obstacles put in their way (*see* *People v Crayton*, 55 Misc 2d 213 [1967]). Activities such as refusing to obey orders (*see* *Decker v Campus*, 981 F Supp 851 [1997]), physically resisting arrest (*see* *Matter of Shannon B.*, 70 NY2d 458 [1987]), interfering with the arrest of another (*Matter of Carlos G.*, 215 AD2d 165 [1st Dept 1995]), or assaulting a police officer (*see* *People v Joseph*, 156 Misc 2d 192 [1992]) are all typical of acts that are properly charged as obstructing governmental administration. The commonality in these offenses is an intentional insertion of one's self or one's intentions into steps taken by police officers to fulfill their duties. By comparison, in the present case, defendant was withdrawing himself and deserting the scene, apparently attempting to avoid any interaction with the officers; and in the absence of a lawful order, his departure cannot be said to be criminal. The court cannot require citizens to predict, assume or infer the directives of police authorities by surmise, thought transference or other faulty or fanciful manner.

(3) The last charge, attempted tampering with physical evidence, is also hereby dismissed. A person is guilty of tampering with physical evidence when,
"[b]elieving that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he suppresses it by ***311** any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person" (Penal Law § 215.40 [2]).

The facts alleged do not support this charge in two ways. First, defendant correctly asserts that, in the absence of any allegation concerning what, if anything, the officer was able to smell or observe that made him believe that the item was marijuana, the court cannot engage in speculation and conjecture as to the nature of the item discarded by the defendant. Thus, if the item discarded was not something which it is illegal to possess, there would be no basis upon which to infer that the defendant intended to prevent the production of the item in any prospective proceeding. Second, the act of dropping a physical object before, or while, fleeing the police does not fit within the several specifically enumerated ways that one might suppress physical evidence as proscribed by the statute. However, this court finds that discarding items before or while fleeing is not what is contemplated by the statute and declines to

expand the statute's reach to that end.

In the case presently before the court, the defendant's alleged behavior may have been suspicious to the officers who observed him, warranting further investigation. However, even while viewing these allegations in the light most favorable to the People (*see* *People v Gonzalez*, 184 Misc 2d 262 [App Term, 1st Dept 2000]), it is clear that they insufficiently plead any actual offense. Accordingly, defendant's motion to dismiss for facial insufficiency is granted.**4

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