

People v Rotella

2006 NY Slip Op 30155(U)

June 5, 2006

Suffolk County Ct

Docket Number: 0002106/2005

Judge: James C. Hudson

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County Court of the County of Suffolk
Part 7 - State of New York

PRESENT:

Hon. JAMES HUDSON

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

ROBERT J. ROTELLA,

Defendant.

ORIG. RETURN DATE: 05/02/06

FINAL SUBMIT DATE: 05/16/06

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Upon the following papers numbered 1 to 6 read on this motion to dismiss indictment _____
Notice of Motion and supporting papers 1-3; Affirmation/affidavit in opposition and supporting papers 4-6;
Affirmation/affidavit in reply and supporting papers _____; Other 7, 8; (and after hearing counsel in support of and
opposed to the motion) it is,

The matter *sub judice* arises from an alleged incident which occurred on April 29th, 2005, in Suffolk County, New York. The People contend that the defendant purchased various compounds which were prepared and mixed so as to transform them into high explosives.

Before the Court are two motions. The first one was partially decided by the Hon. Gary Weber in his decision dated December 23, 2005. This decision postponed the issue of whether Penal Law Section 265.02(2), Criminal Possession of a Weapon in the Third Degree, is constitutionally vague until the Attorney General's office was served with the motion and had an opportunity to address the issue. Upon notification the Attorney General's office declined to intervene in the matter, however, they requested that they be served a copy of the Court's decision. Judge Weber's decision also directed the People to turn over a copy of the Grand Jury minutes to defense counsel. Defense

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counsel has reviewed the Grand Jury minutes and has submitted a second motion contesting its sufficiency. Both motions are addressed in this decision.

The Court will first address the constitutionality of New York State's Penal Law section 265.02(2), Criminal Possession of a Weapon in the Third Degree. Mr. Rotella challenges the statute as unconstitutionally vague on its face and as it is applied to him.

It is beyond cavil that a statute is presumed to be constitutional, and one seeking to invalidate it has the burden of showing its unconstitutionality beyond a reasonable doubt (*People v. Foley*, 94 N.Y.2d 668 [2000] *cert denied* 531 U.S. 875; *People v. Bright*, 71 N.Y.2d 376 [1988]; *People v. Tichenor*, 89 N.Y.2d 769 [1997]; *In re Travis S.*, 96 N.Y.2d 818, 820 [2001]). A statute is unconstitutionally vague when it does not give "fair notice to those to whom (it) is directed" that their behaviors may subject them to criminal prosecution (*People v. Garson*, ___ N.Y.3d ___ [2006], 2006 N.Y. LEXIS 616, 2006 NY Slip Op. 2409, [March, 2006]; *American Communications Assn. v. Douds*, 339 U.S. 382, 412, 94 L. Ed. 925, 70 S. Ct. 674 [1950]). In *People v. Stuart* (100 N.Y.2d 412 [2003]), the Court of Appeals laid out a two-part test for determining whether a statute is void for vagueness. First, a court must determine "whether the statute in question is sufficiently definite 'to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute'" (see *Stuart*, 100 N.Y.2d 412, *supra*, quoting *People v. Nelson*, 69 N.Y.2d 302, 307, [1987]). Second, the statute must be reviewed to determine "whether the enactment provides officials with clear standards for enforcement" (see *Stuart*, 100 N.Y.2d at 420, *supra*). "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement" (see *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855 [1983]).

A statute can be challenged as being unconstitutionally vague on its face or as applied. In the case at bar the defendant has done both. An as-applied challenge questions whether a statute can be constitutionally applied to the defendant under the facts of the case (*People v. Parker*, 41 N.Y.2d 21 [1976]; *Chapman v. United States*, 500 U.S. 453 [1991]), while a facial challenge requires the court to determine whether a statute is unconstitutional without regard to the defendant's conduct. A successful facial challenge means that the law is "invalid *in toto* – and therefore incapable of any valid application" (*People v. Stuart*, 100 N.Y.2d 412 [2003] citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S. Ct. 1186 [1982], quoting *Steffel v. Thompson*, 415 U.S. 453, 94 S.Ct. 1209 [1974]). In a facial challenge the defendant has the "heavy burden" (*Matter of Wood v. Irving*, 85 N.Y.2d 238 [1995]; *People v. Bright* 71 N.Y.2d 376 [1988]) of showing that the statute is unconstitutionally vague in all of its applications (*United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095 [1987]; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186 [1982]; *People v. Stuart*, 100 N.Y.2d 412 [2003]; *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443 [2003]).

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When faced with both an as-applied and a facial constitutional challenge, a Court should first decide whether the statute is impermissibly vague as applied to the defendant (*People v. Stuart*, 100 N.Y.2d 412 [2003]; *People v. Peak Carting, Inc.*, ___ A.D.3d ___ [1 Dept., 2005], 2005 NY Slip Op. 25546; *People v. Nelson*, 69 N.Y.2d 302 [1987]; *People v. Cooper*, 4 Misc.3d 788 [Dist. Ct., Nassau County, 2004]). If the statute is impermissibly vague as applied to the defendant, then the Court must then determine whether the statute is impermissibly vague on its face. If the statute is not impermissibly vague as applied to the defendant, however, the Court's inquiry is concluded on the basis of facial validity of a statute being confirmed by a valid application of same (see *People v. Stuart*, at 422; *People v. Nelson*, at 308).

In the case at bar, Mr. Rotella is charged with five counts of Criminal Possession of a Weapon in the Third Degree for the possession of five different explosive compounds. Specifically, the five items are pentaerythritol tetranitrate (PETN), triacetone triperoxide (TATP), nitroglycerin, ethylene glycol dinitrate (EGDN), and a perchlorate. The first four items are considered high explosives because they have a detonation velocity greater than 3,300 feet per second, and perchlorate is a regular explosive because its detonation velocity is less than 3,300 feet per second.

The relevant part of Penal Law 265.02(2) provides that: "A person is guilty of criminal possession of a weapon in the third degree when: (2) He possesses any explosive or incendiary bomb, bombshell, firearm silencer, machine-gun or any other firearm or weapon simulating a machine-gun and which is adaptable for such use." Although the Penal Law is silent on the definition of "explosive," the definiteness required to pass Constitutional muster can be found in the Labor Law.

Section 451(1) of the Labor Law define explosives as "... gunpowder, powders used for blasting, high explosives, blasting materials, detonating fuses, detonators, and other detonating agents, smokeless powder and any chemical compound or any mechanical mixture containing any oxidizing and combustible units, or other ingredients in such proportions, quantities, or packing that ignition by fire, friction, concussion, percussion or detonation of any part thereof may and is intended to cause an explosion ... Fixed ammunition and primers for small arms, fire-crackers, safety fuses and matches shall not be deemed to be explosives when ... the individual units contain any of the above-mentioned articles or substances in such limited quantity, of such nature and so packed that it is impossible to produce an explosion of such units to the injury of life, limb or property."

Penal Law 265.02(2) plainly prohibits the possession of explosives and Labor Law 451(1) clearly includes "high explosives" in its definition of explosives. Labor Law 451(1) further distinguishes the prohibited explosive items like high explosives from fire-crackers, safety fuses, and matches when these items are of such quantity and packed in such a manner that it would not produce an explosion that would injure life, limb, or property. A person of ordinary intelligence is given fair notice that possession of high explosives is illegal pursuant to Penal Law 265.02(2), and law enforcement is given adequate standards for enforcement. Under the circumstances presented, this

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Court cannot find beyond a reasonable doubt that Penal Law (265.02[2]) is unconstitutionally vague as applied to Mr. Rotella (*People v. Foley*, 94 N.Y.2d 668 [2000], cert denied 531 U.S. 875; *People v. Bright*, 71 N.Y.2d 376 [1988]). Applying the reasoning in *People v. Stuart* (100 N.Y.2d 412 [2003]), we find that the statute in question is not impermissibly vague as applied to the defendant. The statute is, therefore, facially valid.

Defendant next moved to dismiss the indictment on the grounds that the evidence before the Grand Jury was not legally sufficient to establish the offenses charged, and that the Grand Jury proceedings were legally defective (CPL § 210.20 [1] [c] and 210.35[5]).

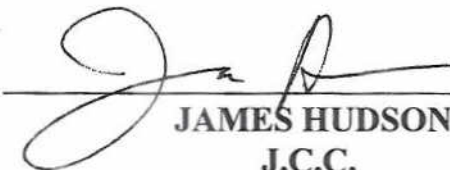
The Court has reviewed the Grand Jury minutes and considered all of the defendant's arguments and finds that the evidence presented to the Grand Jury was legally sufficient to sustain the indictment and that the Grand Jury was properly instructed on the law (*People v. Mayo*, 36 N.Y.2d 1002, 374 N.Y.S.2d 609 [1975]). It is

ORDERED that the Court finds that the defendant has not proved beyond a reasonable doubt that Penal Law Section 265.02(2), Criminal Possession of a Weapon in the Third Degree, is constitutionally vague; and it is further

ORDERED that the evidence presented to the Grand Jury was legally sufficient to sustain the indictment and that the Grand Jury was properly instructed on the law.

This constitutes the decision and order of the Court.

**Dated: Riverhead, New York
June 5, 2006**



**JAMES HUDSON
J.C.C.**