People v Vergona

2007 NY Slip Op 32170(U)

July 18, 2007

Rome City Ct

Docket Number: 0040010/2007

Judge: Daniel C. Wilson

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State of New York
County of Oneida

Rome City Court

People of the State of New York

vs.

MEMORANDUM DECISION

John S. Vergona,
Defendant.

DOCKET NO.
40010

Bernard L. Hyman, Jr., Esq., Asst. District Attorney of Oneida County,
for the People,

David L. Arthur, Esq., Asst. Public Defender of Oneida County,
for the Defendant

PRESENT: Hon. Daniel C. Wilson, City Court Judge:

The defendant has moved this court by a motion which was filed with the court on May 23, 2007 and which was duly submitted to the court for decision on May 30, 2007 for an order seeking dismissal of the charges of Criminal Possession of a Controlled Substance 7th Degree and Promoting Prison Contraband in the 2nd degree for being defective upon their face pursuant to §170.30 and §100.40 of the Criminal Procedure Law. . The People have opposed said motion by an answering affirmation filed with the court and after due deliberation, the court determines the defendant's motion as follows:

The accusatory instrument herein alleging Criminal Possession of a Controlled Substance 7th Degree, which is labeled as an information, states as to the factual allegation regarding an incident occurring on or about the 14th day of May, 2006 at about 10:00 A.M.. as follows:

> On the aforementioned time, date and place said defendant, John S. Vergona, did possess a white powder residue while at Mohawk Correctional Facility on School Rd. in the City of Rome, County of Oneida, N.Y., and said white powder did test positive for the presence of cocaine, a

> controlled substance, using a NIK brand Narco Pouch field test kit. All contrary to the statute made for and provided herein.

The accusatory instrument herein alleging Promoting Prison Contraband in the 2nd Degree, which is labeled as an information, states as to the factual allegation regarding the same incident occurring at the same time as follows:

> On the aforementioned time, date and place said defendant, John S. Vergona, did bring a controlled substance into Mohawk Correctional Facility on School Rd. In the City of Rome, County of Oneida, NY, possess a white powder residue while at Mohawk Correctional Facility on School Rd. in the City of Rome, County of Oneida, N.Y., and said controlled substance being cocaine is considered to be contraband in a secure detention facility. All contrary to the statute made for and provided herein.

An information to be valid upon its face within the provisions of CPL 100.40 would in addition to the requirements of the reasonable cause to believe that the defendant committed the offense charged in the accusatory instrument, also have to establish by, "nonhearsay allegations of the factual part of the information and/or of any supporting depositions" every element of the offense charged and the defendant's commission thereof.

An "information" (charging a misdemeanor or petty offense) must demonstrate "reasonable cause" and be legally sufficient for a prima facie case, a much more demanding standard than what is required for a felony complaint. *People vs. Alejandro*, 70 N.Y.2nd 133 (1987).

The procedural requirements for the factual portion of a local criminal court information are, simply: that it state "facts of an evidentiary character supporting or tending to support the charges" (CPL 100.15 [3]; *see,* CPL 100.40 [1] [a]); that the "allegations of the factual part ... together with those of any supporting depositions ... provide reasonable cause to believe that the defendant committed the offense charged" (CPL 100.40 [1] [b]); and that the "[n]on-hearsay allegations [of the information and supporting depositions] establish, if true, every element of the offense charged and the defendant's commission thereof" (CPL 100.40 [1] [c]; *see,* CPL 100.15 [3]).

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 (*see, People v. Casey, 95 N.Y. 2nd 354, 360;* People v Jacoby, 304 NY 33, 38-40; *People v Knapp,* 152 Misc 368, 370, *affd* 242 App Div 811; *People v Shea,* 68 Misc 2d 271, 272; *see also, People v Allen,* 92 NY2d 378, 385; *People v Miles,* 64 NY2d 731, 732-733).

The *Alejandro* case actually involved a failure to satisfy the first requirement of CPL 100.40 (1) (c), in that there was a total absence of pleading of one of the elements of the crime of Resisting Arrest, i.e., that the defendant had resisted an "*authorized*" arrest (Penal Law §§ 205.30 [emphasis supplied]; *People v Alejandro, supra,* at 135-136). As noted in *People v. Casey*, supra, a defect as in the case at bar would be a jurisdictional non-waivable defect, as opposed to the issue as to whether the supporting deposition contains the proper non-hearsay testimony to support the charge. A defect in the supporting deposition, on the other hand, would not have been jurisdictional. *People v. Casey*, supra.

The Appellate Division 4th Department noted in *Fitzpatrick v. Rosenthal*, 29 A.D. 3rd 24; leave to appeal denied at 6 N.Y. 3rd 715 (May 11, 2006) that reasonable cause is the equivalent of probable cause (*see People v. Maldonado,* 86 N.Y.2d 631, 635, 635 N.Y.S.2d 155, 658 N.E.2d 1028; *People v. Wharton,* 60 A.D.2d 291, 293, 400 N.Y.S.2d 840, *affd.* 46 N.Y.2d 924, 415 N.Y.S.2d 204, 388 N.E.2d 341, *cert. denied* 444 U.S. 880, 100 S.Ct. 169, 62 L.Ed.2d 110), the constitutional prerequisite for a lawful arrest. "The constitutional standard for arrest is probable cause, defined in terms of facts and circumstances 'sufficient to warrant a prudent [person] in believing that the (suspect) had committed or was committing an offense' "(*Gerstein v. Pugh,* 420 U.S. 103, 111, 95 S.Ct. 854, 43 L.Ed.2d 54, quoting *Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142).

The accusatories are not supported by evidentiary facts showing the basis for the conclusion that the substance was a controlled substance, since no supporting depositions are attached. There is no allegation that the police officer is an expert in identifying controlled substances, *People v. Dumas*, 1986, 68 N.Y. 2nd 729; *People v. Kenny*, 30 N.Y. 2nd 154. Accordingly, the accusatories do not set forth a prima facie case upon their face, nor is there a supporting deposition to support any allegations, such that the accusatories do not satisfy the requirements of *Alejandro*, supra, *Casey*, supra, or the *Dumas*, supra case.

Accordingly, the defendant's motion would be granted in all respects, and the accusatory instruments charging Criminal Possession of a Controlled Substance in the 7th degree and Promoting Prison Contraband in the 2nd degree would be dismissed upon their face.

This will constitute the Decision and the Order of the Court.

ENTER:

DANIEL C. WILSON

ROME CITY COURT JUDGE

DATED: July 18, 2007