

**People v Kandler**

2007 NY Slip Op 33280(U)

October 3, 2007

Supreme Court, Suffolk County

Docket Number: 0000251/2005

Judge: Ralph T. Gazzillo

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MEMORANDUM

COUNTY COURT: SUFFOLK COUNTY (CRIMINAL TERM, PART 1)

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**THE PEOPLE OF THE STATE OF NEW YORK,** :  
: :  
Plaintiff : By: **HON. RALPH T. GAZZILLO**  
: **J.C.C.**  
- vs - :  
: Dated: **October 3, 2007**  
: :  
**FRANK KANDLER** :  
Defendant. : Ind. No.: ~~2009-04~~ <sup>251-05</sup>  
: :  
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**HON. THOMAS J. SPOTA**  
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Although originally charged with two (2) felonies, the defendant was permitted to plea to a misdemeanor (Forgery, Third Degree) via a Superior Court Information. As contained within the record, that plea was permitted after balancing the crime committed and the defendant’s prior criminal record and juxtaposing the result to his age and medical condition. Realizing that his prior history would, as a prior felony offender, require a mandatory, harsh term of imprisonment upon conviction of another felony, the prosecution tempered justice with mercy and offered him a misdemeanor plea with “local time.” On January 25, 2005, he accepted and the plea was entered. Now, months and months and adjournment after adjournment later, he seeks to avoid punishment by a way of a so-called “Clayton” motion grounded upon CPL 170. The application, which has been opposed by the prosecution, is decided as follows:

First of all, the application is insufficient as to form. While titled an “Affirmation,” defense attorney’s recitation of the facts is presented in affidavit form but without an appropriate jurat.

Secondarily, the application is woefully without merit. Grounded upon the alleged lack of severity of the crime, the defendant’s health, that of his wife, the recommendation of the Department of Probation, his “questionable” guilt, the defense seeks the matter’s complete dismissal.

Individually, and collectively, however, none of these allegations require - much less persuade - the undersigned to detour from the previously agreed upon sentence. Indeed, and notwithstanding the defense's contentions regarding the lack of severity of the offense, there are indications that the crime committed was merely part of a larger scheme. While the defendant stands innocent of those allegations, they are important to note as being among the ingredients reviewed by the prosecution before determining an appropriate plea-offer. Moreover, and as to the alleged lack of severity of the crime, it bears repeating (and underscoring) that the defendant was originally charged with two felonies. Following extensive plea negotiations which pivoted on his health, he was permitted - mercifully- to avoid mandatory "state time" by pleading to a single misdemeanor.

Similarly unpersuasive is the recommendation of the Department of Probation. Their input is, of course, always welcome and by law required. In the final analysis, however, assigning the appropriate weight of their report is left to the Court's sound discretion. It stands beyond peradventure that the final sentencing determination is the sole province of the Court, and that authority - and responsibility - is not to be delegated, much less surrendered.

Finally, as to the defendant's so-called "questionable guilt," he acted in direct contradiction of that issue on January 25, 2005, when, before the undersigned, under oath, in open court, and while accompanied by counsel, he knowingly, freely, and voluntarily fully admitted his culpability. Notably, while he has been given more than ample time to attack that proceeding, he has not. Indeed, and as evidenced by the issue of his plea's absence from the instant application, he apparently still has opted not to mount a serious challenge to it.

The applicable law in this area begins with the statute, which states the following:

C P L. §210.40 Motion to dismiss indictment; in furtherance of justice.  
An indictment or any count thereof may be dismissed in furtherance of justice, as provided in paragraph (i) of subdivision one of section 210.20, when, even though there may be no basis for dismissal as a matter of law upon any ground specified in paragraphs (a) through (h) of said subdivision one of section 210.20, such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice. In determining whether such compelling factor, consideration, or circumstance exists, the court must, to the extent applicable, examine and consider, individually and collectively, the following:

- (a) the seriousness and circumstances of the offense;
- (b) the extent of harm caused by the offense;
- © the evidence of guilt, whether admissible or inadmissible at trial;
- (d) the history, character and condition of the defendant;
- (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
- (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;

- (g) the impact of a dismissal upon the confidence of the public in the criminal justice system;
- (h) the impact of a dismissal on the safety or welfare of the community;
- (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
- (j) any other relevant fact indicating that a judgement of conviction would serve no useful purpose.

In addition to this statutory basis, there are a number of appellate decisions which offer guidance. For example, in *People v. Natarelli*, 154 AD2d 769 (3d Dept 1989) it was noted that,

“CPL 210.40 allows a court to ‘dismiss an indictment in the interests of justice, irrespective of guilt or innocence, in those *rare and compelling instances* in which the public interests and the individual interest of the accused coincide and permit the court to exercise forbearance.’ In exercising this option, a court’s discretion is not absolute and should be reserved for that *unusual situation* which cries out for fundamental justice.”

*Id.* at 770 (citations omitted)(emphases supplied).

In rejecting an interests of justice application founded on the defendant’s advanced age and alleged ill health, the unanimous *Natarelli* panel further added that those issues would be more appropriately considered at sentencing, should the defendant be convicted.

There are myriad cases with respect to illness as a factor. As to be anticipated, all of those decisions are, of course, fact-specific. As in *Natarelli*, however, the overwhelming common thread is their underscoring that in order to prevail on a dismissal motion grounded upon medical grounds, a defendant must overcome a high hurdle. Indeed, in *People v. Kennard*, 266 AD2d 718 (3d Dept 1999), the defendant had pleaded to two felonies in exchange for a *conditionally* promised sentence of two *concurrent* terms of 3 to 6 years incarceration. Between the plea and sentence he was re-arrested and, as a result, was in violation of one of the plea’s conditions and facing enhanced sentencing. He submitted an interest of justice motion, founded upon his diagnosis of terminal cancer and survival prognosis of six months to no longer than two years. The application was denied. That denial, as well as the sentence of two *consecutive* prison terms of 3 to 6 years, was affirmed.

In the instant matter, the issue of the defendant’s health was given due consideration in selecting and appropriate plea and sentence.

Finally, and juxtaposing the instant matter’s facts to the statute, the undersigned finds as follows:

- (a) *the seriousness and circumstances of the offense.* As indicated above, the crime charged is a misdemeanor. The caveat, however, is that the motivating factor to reduce it

from two (2) felonies was the defendant's health. That merciful reduction notwithstanding, the offense remains a crime which is no means petty.

As to the circumstances, he copied a dealer plate - an act which, in view of his prior record, demonstrates his previous disregard for the law continues unabated.

*(b) the extent of harm caused by the offense.* There is no appropriate measurement for this factor.

*(c) the evidence of guilt, whether admissible or inadmissible at trial.* As indicated, and in addition to the prosecutor's indications of greater culpability, he has, under oath, satisfied the Court of his guilt beyond any doubt. This is undisturbed by his hollow remarks that he was unaware of his acts' illegality. As the facts revealed in the record reflect, such a position is indefensible and offensive.

*(d) the history, character and condition of the defendant.* As to the defendant's criminal history, he has ten prior arrests which yielded three (3) previous felony convictions. Most remarkable is the fact that despite substantial incarceration, it appears that he has yet to be deterred from criminal involvement.

*(e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant.* None has been alleged.

*(f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense.* The sentence authorized would, hopefully, result in deterrence of such future behavior and perhaps finally result in the defendant's rehabilitation. Indeed, any subsequent felony conviction would may carry the potential for further mandatory and enhanced incarceration.

*(g) the impact of a dismissal upon the confidence of the public in the criminal justice system.* When solely grounded upon physical condition alone, case law underscores that the "interests of justice" are rarely satisfied by a dismissal. In the absence of any other compelling reason, such a dismissal would be in knowing, indefensible disregard of apparently controlling law and possibly perceived as outside the expected norms. This disparity could undermine the public's perception of justice, who might view it as a sham where a history of lawless behavior is overridden, and then overridden still again because of an offender's health.

(h) *the impact of a dismissal on the safety or welfare of the community.* There is no indication that the defendant is at all remorseful. That, coupled with his history of anti-social behavior, engenders concern for the community.

(i) *where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion.* None has been supplied.


(j) *any other relevant fact indicating that a judgement of conviction would serve no useful purpose.* Under the facts and circumstances of this case, none has been supplied.

Statutorily imposed issues aside, the Court is compelled to note the following: The defendant's health, as well as that of his wife, is unfortunate. That, however, is neither an excuse for his crime nor a substitute for his punishment under the law. Owing to his situation, he has clearly and undeniably been afforded ample and extraordinary clemency. Having obtained that mercy and as he at the precipice of receiving the bargained-for benefit, he asks the Court to renegotiate his agreement and, using the same currency, secure a better bargain. On its face, that is inequitable and at odds with common, acceptable practice. Indeed, one can only hope that this, his attempt at a "second bite of the apple," will not deter the prosecution's from giving due consideration to a defendant's health in determining a proper plea offer.

In sum, the Court finds that neither case law nor the facts of this case warrant the extraordinary relief requested. As noted, there is apparently but one basis for the request - the defendant's alleged condition. Standing alone, it is manifestly insufficient; indeed, in today's society, an adult with his condition does not appear to the "rare or compelling instance" nor the "unusual situation" contemplated by the statute as explained in *People v. Natarelli, supra*. Lastly, the crime alleged, the defendant's undisputed criminal record, as well as the anticipated negative impact a dismissal on the proffered grounds would have on the public's confidence, all undermine the appropriateness of granting the application

The application for dismissal of the indictment in the interests of justice is, therefore, denied in all respects.

The foregoing constitutes the decision and order of the Court.



Hon. Ralph T. Gazzillo  
Judge of the County Court